SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 112

DAVIES WAREHOUSE COMPANY, PETITIONER,

vs.

PRENTISS M. BROWN, PRICE ADMINISTRATOR

ON WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

INDEX.

	Page
Proceedings in United States Emergency Court of Appeals	1
Complaint	1
Answer	13
Proceedings before Price Administrator	15
Protest filed with Secretary of Office of Price Administration	15
Exhibit "A"—Decision of Railroad Commission of California in Application No. 24723	36
Exhibit "B"—Affidavit of L. A. Bailey	37
Exhibit "C"—Affidavit of L. A. Bailey	40
Order denying protest	41
Opinion of administrator	42
General maximum price regulation	46
Statement of considerations involved in the issuance of the General Maximum Price Regulation	76
Supplementary Regulation No. 11	97
Statement of considerations involved in the issuance of Supplementary Regulation No. 11	99
Amendment No. 1 to Supplementary Regulation No. 11	101
Statement of considerations involved in the issuance of Amendment No. 1 to Supplementary Regulation No. 11	106
Certificate to transcript of proceedings	108

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	Original	Print
Opinion, Maris, J.		109
Concurring opinion, Magruder, J.		118
Dissenting opinion, Vinson, J.		119
Judgment		145
Praecipe for transcript of record		145
Clerk's certificate		146
Order substituting party respondent		146
Order allowing certiorari		147

Before the

United States Emergency Court of Appeals

DAVIES WAREHOUSE COMPANY, a corporation,

Complainant,

vs.

LEON HENDERSON, Price Administrator,

Respondent.

COMPLAINT

The complaint of Davies Warehouse Company respectfully shows, and your complainant avers as follows, to-wit:

I.

That complainant is now, and during all of the times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its post office address is 126 South Central Avenue, Los Angeles, California.

That complainant is a "warehouseman" as defined in Section 2½ of the Public Utilities Act of the State of California (Statutes of California, 1915, Chapter 91, as amended) which reads as follows:

"The term 'warehouseman', when used in this act, includes every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any building, or structure, or warehouse, in which merchandise, other than second-hand household goods or effects, and other than merchandise sold but retained in the custody of the vendor, is regularly stored for the public generally, for compensation, within this state, excepting warehouses conducted by any non-profit, cooperative association or corporation which is engaged in the handling or marketing of the agricultural products of its members; also excepting warehouses conducted by the agents, individual or corporate, of such associations or corporations, while acting within the limitations imposed by law on the principal of any such agent."

7

That in the conduct of its business, which is wholly within the City of Los Angeles, California, complainant stores and handles general merchandise for the public generally, for compensation, and renders other services incident thereto.

That complainant is a public utility as that term is defined in Section 2(dd) of said Public Utilities Act, reading as follows:

"The term 'public utility', when used in this act, includes every common carrier, toll-bridge corporation, pipe line corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, wharfinger, warehouseman, and heat corporation, where

the service is performed for or the commodity delivered to the public or any portion thereof."

That the business of complainant as a warehouseman is subject to regulation by the legislature of the State of California under and by virtue of the provisions of Section 33, of Article IV of the Constitution of the State of California, reading as follows:

"The legislature shall pass laws for the regulation and limitation of the charges for services performed and commodities furnished by telegraph and gas corporations, and the charges by corporations or individuals for storage and wharfage, in which there is a public use; and where laws shall provide for the seleetion of any person or officer to regulate and limit such rates, no such person or officer shall be selected by any corporation or individual interested in the business to be regulated, and no person shall be selected who is an officer or stock holder in any such corporation."

That under and by virtue of Section 23 of Article XII of said Constitution, the business of a warehouseman, such as is engaged in by complainant, was declared to be a public utility and subject to such control and regulation by the Railroad Commission as might be conferred upon it by the legislature of the State of California; that section of the Constitution, insofar as is here pertinent, reads as follows:

"Every private corporation, and every individual or association of individuals, owning, operating, managing, or controlling any commercial railroad, interurban railroad, street railroad, canal, pipe line, plant, or equipment, or any part of

such railroad, canal, pipe line, plant, or equipment within this state, for the transportation or conveyance of passengers, or express matter, or freight of any kind, including crude oil or for the transmission of telephone or telegraph messages, or for the production, generation, transmission, delivery or furnishing of heat, light, water or power or for the furnishing of storage or wharfage facilities, either directly or indirectly, to or for the public, and every common carrier, is hereby declared to be a public utility subject to such control and regulation by the Railroad Commission as may be provided by the legislature, and every class of private corporations, individuals, or associations of individuals hereafter declared by the legislature to be public utilities shall likewise be subject to such control and regulation. The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the legislature, and the right of the legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution. * * *."

That complainant is filing this complaint on behalf of itself and on behalf of all other warehousemen who are subject, as public utilities, to the jurisdiction and control of the Railroad Commission of the State of California under and by virtue of said Sections 2(dd) and 2½ of said Public Utilities Act, and under and by virtue of said Section 33 of Article IV and said

Section 23 of Article XII of the Constitution of the State of California; that complainant and all of said warehousemen who are under the jurisdiction and control of said Railroad Commission under and by virtue of said Statutes and said Constitutional provisions (hereinafter referred to as "such other warehousemen"), are bailees for hire in the same general class of business and all thereof operate solely within the State of California.

II.

That respondent is now, and during all of the times herein mentioned was, the duly appointed, qualified and acting Price Administrator under the provisions of the Emergency Price Control Act of 1942 (Public Law 421—77th Congress; Chapter 26—2nd Session; HR-5990).

III.

That the regulations issued by respondent and the dates of issuance thereof to which complainant has protested are as follows:

(a) The General Maximum Price Regulation issued on April 28, 1942;

(b) Supplementary Regulation No. 11, issued on June 16, 1942, of said General Maximum Price Regulation, and

(c) Amendment No. 1 to Supplementary Regulation No. 11, issued on June 23, 1942, of said General Maximum Price Regulation.

IV.

That the date on which the protest of such regulations was filed with respondent was June 26, 1942; that respondent denied said protest on the 27th day of July, 1942.

V.

That the manner in which complainant has been aggrieved by the denial of its protest is as follows:

That under the provisions of the Emergency Price Control Act of 1942, and particularly under Section 302(c)(2) thereof, the rates charged by your complainant as a public utility are not subject to the regulations of respondent; that irrespective of, and contrary to, the fact that the rates charged by your complainant as a public utility are not subject to the regulations of respondent, he has construed said Maximum Price Regulation of April 28, 1942 to include the rates charged by your complainant for public utility storage and warehousing and all services incident thereto to be subject to his regulations;

That under the provisions of Supplementary Regulation No. 11 issued by respondent on June 16, 1942, of said General Maximum Price Regulation, and particularly under sub paragraph (2) of paragraph (a) of Part 1499.46 thereof, the rates charged by your complainant for said services are, by implication, governed by the regulations contained in said General Maximum Price Regulation of April 28, 1942, irrespective of, and contrary to, the fact that said rates are exempt from such regulations under and

by virtue of said Section 302(c)(2) of the Emergency Price Control Act of 1942.

That under the provisions of Amendment No. 1 to Supplementary Regulation No. 11 issued by respondent on June 23, 1942 of said General Maximum Price Regulation of April 28, 1942, and particularly under sub paragraph (68) of paragraph (b) of Part 1499.46 thereof the charges of a public utility warehouseman for storage and warehousing and all other services incident thereto are not excluded from the General Maximum Price Regulation, irrespective of, and contrary to, the fact that such charges are exempt from such regulations under and by virtue of the provisions of said Section 302(c)(2) of the Emergency Price Control Act of 1942.

That by reason of the aforesaid regulations, respondent has erroneously, unlawfully and arbitrarily subjected the rates charged for said services by complainant and such other warehousemen to the regulations imposed by and under the said General Maximum Price Regulation of April 28, 1942, and, unless the regulations herein complained of are set aside insofar as they include the charges of complainant and such other warehousemen for said services, your complainant and such other warehousemen will be required to charge for said services the rates which they were assessing and collecting for said services during the month of March 1942 instead of increased rates for said services as may be prescribed by the Railroad Commission of the State of California under the provisions of said Public Utilities Act, particularly under Section 63(a) thereof, reading as follows:

"No public utility shall raise any rate, fare, toll, rental or charge or so alter any classification, contract, practice, rule or regulation as to result in an increase in any rate, fare, toll, rental or charge, under any circumstances whatsoever, except upon a showing before the commission and a finding by the commission that such increase is justified."

That, in particular, your complainant and such other warehousemen have been aggrieved by the denial by respondent of said protest because the rates charged by them for storage and warehousing and all services incident thereto under the regulations herein complained of are frozen as of March 1942, except insofar as increases have been approved by respondent in his Order No. 7 (1499.357) of July 29, 1942, in respondent's Docket No. GF3-453 and his Order No. 8 (1499.358) of July 29, 1942, in respondent's Docket No. GF3-454; that even the increases as approved by respondent in his said Orders Nos. 7 and 8 may, by their terms, "be revoked or amended by the Price Administrator at any time"; that by reason of the denial by respondent of said protest, complainant and such other warehousemen are placed under two price ceilings, namely: that fixed by said Railroad Commission and that erroneously, unlawfully and arbitrarily fixed by respondent, the result of which is to require complainant and such other warehousemen to first obtain authorization from said Railroad Commission to increase their rates for said services upon a finding that such increases are justified based upon said Railroad Commission's stand-

ard of sufficiency of a showing after which complainant and such other warehousemen will not be able to publish and make effective the increased rates as authorized by said Railroad Commission on the effective date of said Railroad Commission's order but will then be required to file an Application for Adjustment under Section 1499.18 of said General Maximum Price Regulation with consequent delay, needless expense and to the financial detriment of complainant and such other warehousemen; that inasmuch as complainant and such other warehousemen are exempt from the regulations of respondent, they should not be subjected to the provisions of the regulations herein complained of and said regulations should be set aside insofar as the charges of complainant and such other warehousemen for said services are concerned.

VI.

That each objection asserted against said regulations upon which complainant intends to rely are as follows:

1. Objection is hereby made to the General Maximum Price Regulation of April 28, 1942, if the provisions thereof are to be construed as including under its regulation the rates or charges of your complainant and such other warehousemen for public utility storage and warehousing and all other services incident thereto.

That the grounds in support of this objection are as follows:

Complainant and such other warehousemen who are in the same general class of business within the State of California and who are subject to the jurisdiction and control of the Railroad Commission of the State of California, particularly under and by virtue of said Section 2½ of said Public Utilities Act, are public utilities and will continue to be public utilities, under the jurisdiction and control of said Commission.

Complainant and such other warehousemen are public utilities within the meaning of the exemption contained in said sub paragraph (2) of paragraph (c) of Section 302 of said Emergency Price Control Act of 1942, and the provisions of the said General Maximum Price Regulation of April 28, 1942, the said Supplementary Regulation No. 11 of June 16, 1942 and the said Amendment No. 1 to Supplementary Regulation No. 11 of June 23, 1942, are void and of no effect whatever insofar as they declare that the rates charged for storage and warehousing and all other services incident thereto by a public utility, such as complainant and such other warehousemen, are not excluded from the regulations imposed by and under the said General Maximum Price Regulation. The action of respondent in denying said protest on the ground that complainant is not a public utility within the exemption of 302(c)(2) of the Emergency Price Control Act of 1942 was, and is, arbitrary, unlawful, erroneous and capricious.

2. Objection is also hereby made to the provisions of Supplementary Regulation No. 11 issued on the

16th day of June, 1942, of the General Maximum Price Regulation of April 28, 1942, insofar as the same, by implication, includes under its regulations the rates and charges of your complainant and such other warehousemen for public utility storage and warehousing and all other services incident thereto.

The grounds in support of this objection are the same as are urged in support of Objection No. 1 herein, and said grounds are hereby referred to and made a part hereof by such reference.

3. Objection is also hereby made to the provisions of Amendment No. 1 to Supplementary Regulation No. 11 issued on the 23rd day of June, 1942, of the General Maximum Price Regulation of April 28, 1942, insofar as the same includes under its regulations the rates and charges of your complainant and such other warehousemen for public utility storage and warehousing and all other services incident thereto.

The grounds in support of this objection are the same as are urged in support of Objection No. 1 herein, and said grounds are hereby referred to and made a part hereof by such reference.

VII.

That the nature of the relief requested by complainant is as follows: Complainant requests an order of this Honorable Court setting aside said regulations insofar as they include the charges of complainant and such other warehousemen for public utility storage and warehousing and all services incident thereto.

WHEREFORE, your complainant asks that this Honorable Court make its order setting aside (a) The General Maximum Price Regulation issued by respondent on April 28, 1942, (b) Supplementary Regulation No. 11 issued by respondent on June 16, 1942 of said General Maximum Price Regulation, and (c) Amendment No. 1 to Supplementary Regulation No. 11 issued by respondent on June 23, 1942 of said General Maximum Price Regulation insofar as they, and each of them, include under their regulations the charges of complainant and such other warehousemen for public utility storage and warehousing and all services incident thereto.

Dated at San Francisco, California, this 20th day of August, 1942.

DAVIES WAREHOUSE COMPANY,
By L. A. BAILEY,
Its Vice-President.

REGINALD L. VAUGHAN,
Attorney for Complainant
Mills Tower, San Francisco,
California.

[fols. 13-14] IN THE UNITED STATES EMERGENCY COURT OF APPEALS

No. 5

DAVIES WAREHOUSE COMPANY, a Corporation, Complainant,

v.

LEON HENDERSON, Price Administrator, Respondent

ANSWER

Now comes Leon Henderson, Price Administrator of the Office of Price Administration, Respondent, by his duly authorized attorney, and pursuant to Rule No. 16 of the Rules of this Court, makes answer to the complaint of Davies Warehouse Company, a corporation, Complainant herein, by admitting, for purposes of the proceedings on the Complaint, or denying, facts alleged therein as follows:

(1) Respondent admits the facts alleged in unnumbered paragraphs 1 and 3 of Section I of said Complaint;

(2) Respondent neither admits nor denies the allegations of unnumbered paragraphs 2, 4, 5, 6, and 7 of Section I of said Complaint but affirmatively states such allegations to be conclusions of law to which Respondent does not plead;

(3) Respondent admits the facts alleged in Sections II, III, and IV of said Complaint;

[fols. 15-16] (4) Respondent denies the allegations of Sections V and VI of said Complaint, except that Respondent admits that he has construed said General Maximum Price Regulation of April 28, 1942 as applicable to the rates charged by Complainant for its storage, warehousing and services incident thereto.

(5) Respondent affirmatively alleges and states the fact to be that by Respondent's Order No. 8 under Section 1499.18 (c) of the General Maximum Price Regulation (7 Fed. Reg. 5913) Respondent authorized the Complainant to sell and deliver, and authorized any person to buy and receive from the Complainant, storage and warehousing and services incident thereto at prices not higher than the

rates and charges authorized by the Railroad Commission of the State of California in its Decision No. 35361, in Application No. 24723, dated May 12, 1942, and admits that by its terms such Order No. 8 may be revoked or amended by the Price Administrator at any time.

Wherefore, the Respondent prays that the Complaint be dismissed.

David Ginsburg, General Counsel.

In the United States Emergency Court of Appeals

No. 5

DAVIES WAREHOUSE COMPANY, A CORPORATION,
COMPLAINANT

v.

LEON HENDERSON, PRICE ADMINISTRATOR, RESPONDENT

TRANSCRIPT OF PROCEEDINGS BEFORE THE PRICE ADMINISTRATOR

[PROTEST FILED WITH THE SECRETARY OF THE OFFICE OF PRICE ADMINISTRATION ON JUNE 26, 1942]

BEFORE THE OFFICE OF PRICE ADMINISTRATION

Docket Number GFI–428–P

In the Matter of the Protest of DAVIES WAREHOUSE COMPANY, a corporation, to the provisions of the General Maximum Price Regulation of April 28, 1942, to Supplementary Regulation No. 11 thereof, issued on the 16th day of June 1942, and to Amendment No. 1 of Supplementary Regulation No. 11 thereof, issued on the 23d day of June 1942

Protest to general maximum price regulation of April 28, 1942, to Supplementary Regulation No. 11 thereof, issued on the 16th day of June 1942, and to Amendment No. 1 of Supplementary Regulation No. 11, issued on the 23d day of June 1942

The protest of Davies Warehouse Company, a corporation, respectfully shows and your protestant avers as follows, to wit:

I

That your protestant is a corporation duly organized and existing under and by virtue of the laws of the State of California; that its post-office address is 126 South Central Avenue, Los Angeles, California.

That the nature of the business of protestant is as follows: Your protestant is a "warehouseman" as defined in Section 2½ of the Public Utilities Act of the State of California (Statutes of California, 1915, Chapter 91, as amended) which reads as follows:

> The term "warehouseman" when used in this act, includes every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any building, or structure, or warehouse, in which merchandise, other than second-hand household goods or effects, and other than merchandise sold but retained in the custody of the vendor, is regularly stored for the public generally, for compensation, within this State, excepting warehouses conducted by any nonprofit, cooperative association or corporation which is engaged in the handling or marketing of the agricultural products of its members; also excepting warehouses

> conducted by the agents, individual or corporate, of such associations or corporations, while acting within the limitations imposed by law on the principal of any such agent.

In the conduct of its business, which is conducted in the City of Los Angeles, California, your protestant stores and handles general merchandise for the public generally, for compensation, and renders other services incident thereto.

Your protestant is a public utility as that term is defined in Section 2 (dd) of said Public Utilities Act, reading as follows:

> The term "public utility", when used in this act, includes every common carrier, toll-bridge corporation, pipe-line corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, wharfinger, warehouseman, and heat corporation, where the service is performed for or the commodity delivered to the public or any portion thereof.

The business of your protestant as a warehouseman is subject to regulation by the legislature of the State of California by virtue of the provisions of Section 33, of Article IV of the Constitution of the State of California, reading as follows:

> The legislature shall pass laws for the regulation and limitation of the charges for services performed and commodities furnished by telegraph and gas corporations, and the charges by corporations or individuals for storage and wharfage, in which there is a public use; and where laws shall provide for the selection of

any person or officer to regulate and limit such rates, no such person or officer shall be selected by any corporation or individual interested in the business to be regulated, and no person shall be selected who is an officer or stockholder in any such corporation.

Under Section 23 of Article XII of said Constitution, the business of a warehouseman, such as is engaged in by your protestant, was declared to be a public utility and subject to such control and regulation by the Railroad Commission as might be conferred upon it by the legislature of the State of California; that section of the Constitution, insofar as is here pertinent, reads as follows:

> Every private corporation, and every individual or association of individuals, owning, operating, managing, or controlling any commercial railroad, interurban railroad, street railroad, canal, pipe line, plant, or equipment, or any part of such railroad, canal, pipe line, plant, or equipment within this state, for the transportation or conveyance of passengers, or express matter, or freight of any kind, including crude oil or for the transmission of telephone or telegraph messages, or for the production, generation, transmission, delivery or furnishing of heat, light, water or power or for furnishing of storage or wharfage facilities, either directly or indirectly, to or for the public and every common carrier, is hereby declared to be a public utility subject to such control and regulation by the Railroad Commission as may be provided by the legislature, and every class of private corporations, individuals, or associations of individuals here-

after declared by the legislature to be public utilities shall likewise be subject to such control and regulation. The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the legislature, and the right of the legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution * * *.

That your protestant is filing this protest on behalf of itself and on behalf of all other warehousemen who are subject to the jurisdiction and control of the Railroad Commission of the State of California under and by virtue of said Sections 2 (dd) and 2½ of said Public Utilities Act, and under and by virtue of said Section 33 of Article IV and said Section 23 of Article XII of the Constitution of the State of California; that your protestant and all of said warehousemen who are under the jurisdiction and control of said Railroad Commission under and by virtue of said Statutes and said Constitutional provisions, are bailees for hire in the same general class of business and all thereof operate solely within the State of California.

That the manner in which your protestant is subject to the regulations herein protested is as follows:

Under the provisions of the Emergency Price Control Act of 1942 (Public Law 421, 77th Congress; Chapter 26, 2nd Session; H. R. 5990) and particularly sub-

paragraph (2) of paragraph (c) of Section 302 thereof, the rates charged by your protestant as a public utility are not subject to the regulations of the Office of Price Administration;

Under the provisions of the General Maximum Price Regulation of April 28, 1942, and particularly under paragraph (e) of Section 10 thereof, the rates charged by your protestant as a public utility are not subject to the provisions thereof.

Under the provisions of Supplementary Regulation No. 11 of the Office of Price Administration of June 16, 1942 and particularly under subparagraph (2) of paragraph (a) of Part 1499.46 thereof, the rates of your protestant are, by implication, governed by the regulations contained in the General Maximum Price Regulation of April 28, 1942, despite the fact that said rates are exempt from such regulations under and by virtue of the said provisions of the Emergency Price Control Act of 1942.

Under the provisions of Amendment No. 1 to Supplementary Regulation No. 11 of the General Maximum Price Regulation of April 28, 1942, and particularly under subparagraph (68) of paragraph (b) of Part 1499.46 thereof, the "charges for storage and warehousing and all other services incident thereto by any person shall not be excluded from the General Maximum Price Regulation" despite the fact that said charges are exempt from such regulations under and by virtue of the said provisions of the Emergency Price Control Act of 1942.

II

That the name of the person filing this protest on behalf of protestant is L. A. Bailey, and his post office address is 216 Pine Street, San Francisco, California; that the name of the person to whom all communications from the Office of Price Administration relating to this protest shall be sent is Reginald L. Vaughan, and his post office address is Mills Tower, 220 Bush Street, San Francisco, California.

III

That a statement of all objections raised by protestant is as follows:

1. Protest is hereby made to the General Maximum Price Regulation of April 28, 1942, if the provisions thereof are to be construed as including under its regulation the rates or charges of your protestant and such other warehousemen who are in the same general class of business within the State of California, as aforesaid.

2. Protest is also hereby made to the provisions of Supplementary Regulation No. 11 issued on the 16th day of June 1942 of the General Maximum Price Regulation of April 28, 1942, insofar as the same, by implication, includes, under its regulations, the rates and charges of your protestant and such other warehousemen.

3. Protest is also hereby made to the provisions of Amendment No. 1 of Supplementary Regulation No. 11 issued on June 23, 1942, of the General Maximum Price Regulation of April 28, 1942, insofar as the

same includes under its regulations the rates and charges for storage and warehousing and all other services incident thereto by your protestant and such other warehousemen.

IV

That a statement of all facts alleged in support of this protest is as follows:

Your protestant and such other warehousemen who are in the same general class of business within the State of California and who are subject to the jurisdiction and control of the Railroad Commission of the State of California, particularly under and by virtue of said Section 2½ of said Public Utilities Act, are public utilities and will continue to be public utilities, under the jurisdiction and control of said Commission. As public utilities your protestant and such other warehousemen are subject to the burdens of the laws of the State of California and are entitled to the benefits thereof; that as public utilities, your protestant and such other warehousemen:

(a) Are required to file certified annual reports with said Railroad Commission in the form required by said Commission under its prescribed uniform system of accounts;

(b) Must file, publish, and keep open to public inspection, their tariff rates and charges, rules and regulations;

(c) Must charge rates and render service to all members of the public alike, without undue discrimination or preference;

(d) Must abide by their schedules of rates and charges as published and filed with said Railroad Commission until changed in the manner provided in said Public Utilities Act;

(e) Are subject to investigation as to the reasonableness of their rates and charges upon complaint made by said Railroad Commission on its own motion, or upon complaint of any member of the public, and

(f) Are required to maintain and operate their warehouse facilities in a safe and dependable manner and in all respects adequate for the purposes to which such facilities are devoted, to wit, as warehousemen for the storage and handling of property for the public generally, for compensation.

There are other restraints imposed upon your protestant and such other warehousemen because of the fact that they are public utilities, such as the prohibition against the selling, leasing, transferring, or encumbering of their public-utility facilities without the approval of the Railroad Commission of the State of California, and the prohibition against their issuing stock or incurring obligations without the consent of said Railroad Commission.

As public utilities your protestant and such other warehousemen are subject to the same degree of regulation and control by said Railroad Commission as are common carriers by rail, vessel and motor carrier, since warehousemen and said classes of common carriers are subject to, and are regulated by, the same Statute, namely, the Public Utilities Act of the State of California, which also includes the regulation of

other classes of public utilities, such as gas corporations, electric corporations, telephone corporations, telegraph corporations and water corporations.

The failure on the part of your protestant and such other warehousemen, and the officers and employees thereof to comply with the provisions of said Public Utilities Act, and the orders of said Railroad Commission rendered thereunder, constitute violations of the law, which would subject them to imposition of penalties or imprisonment.

Your protestant and such other warehousemen are public utilities within the meaning of the exemption contained in said subparagraph (2) of paragraph (e) of Section 302 of said Emergency Price Control Act of 1942, and the provisions of the said General Maximum Price Regulation of April 28, 1942, the said Supplementary Regulation No. 11 of June 16, 1942, and the said Amendment No. 1 to Supplementary Regulation No. 11 of June 23, 1942, are void and of no effect whatever insofar as they declare that rates and charges for storage and warehousing and all other services incident thereto by a public utility, such as your protestant and such other warehousemen, are not excluded from the regulations imposed by and under the said General Maximum Price Regulation.

That your protestant has a right to file this protest by virtue of the fact that, since the Price Administrator has erroneously, unlawfully, and arbitrarily subjected your protestant and such other warehousemen to the regulations imposed by and under the said General Maximum Price Regulation of April 28, 1942,

your protestant will be required to charge for storage and warehousing and all other services incident thereto, the charges which your protestant was assessing and collecting during the month of March, 1942, instead of the increased charges for such services as have been prescribed by the Railroad Commission of the State of California in its Decision No. 35361, of the 12th day of May, 1942, in Application No. 24723; that a true copy of said Decision No. 35361 is attached hereto, made a part hereof and marked Exhibit "A".

That said application and said decision were filed and rendered under and pursuant to the provisions of Section 63 (a) of said Public Utilities Act, reading as follows:

> No public utility shall raise any rate, fare, toll, rental, or charge, or so alter any classification, contract, practice, rule, or regulation as to result in an increase in any rate, fare, toll, rental, or charge, under any circumstances whatsoever, excepting upon a showing before the Commission and a finding by the Commission that such increase is justified.

That the rates charged and assessed by your protestant during the month of March 1942 (which would be frozen under said regulation), are lower than the rates which are now in effect and which have been in effect since June 1, 1942, as authorized by said Railroad Commission in its said Decision No. 35361; that the increases in the rates as authorized by said decision were based upon an increase in the cost of labor to your protestant, and such increases were, are, and

will continue to be necessary in order that your protestant may continue to render adequate warehousing service to the general public.

That these increased labor costs which made these increased rates necessary were largely experienced by your protestant in November of 1941, and your protestant would have increased its rates to the same extent as authorized by said Decision No. 35361 during that month, except for the fact that, as a public utility, it was restrained from so doing under the provisions of said Section 63 (a) of said Public Utilities Act, prohibiting the increase in any rate or charge under any circumstances whatsoever, except upon a showing before said Railroad Commission and a finding by that Commission, that such increase is justified.

That in view of all of these facts and particularly the fact that protestant and such other warehousemen are public utilities, they should be declared exempt from the regulations imposed by and under the General Maximum Price Regulation of April 28, 1942, as the same is now or may hereafter be amended.

That there is attached hereto, made a part hereof, and marked Exhibit "B" an affidavit of L. A. Bailey setting forth in full all the evidence, the presentation of which is subject to the control of the protestant, upon which protestant relies in support of the facts alleged herein.

That there is attached hereto, made a part hereof, and marked Exhibit "C" an affidavit of L. A. Bailey setting forth in detail the material and sources of further evidence, not subject to his control, upon

which he believes he can rely in support of the facts alleged herein.

WHEREFORE, your protestant protests to the provisions of the General Maximum Price Regulation of April 28, 1942, insofar as the same may be construed to subject the rates and charges of the public utility services rendered by protestant to regulation thereunder.

Your protestant protests to subparagraph (2) of paragraph (a) of Part 1499.46 of Supplementary Regulation No. 11 of the General Maximum Price Regulation of April 28, 1942, insofar as it regulates, by implication, the rates and charges of protestant and such other warehousemen and hereby request that such subparagraph be changed to read as follows:

> (2) Commercial storage and warehousing and services incident thereto other than public utility warehousemen within the exemption conferred by Section 302 (c) of the Emergency Price Control Act of 1942.

Your protestant protests to subparagraph (68) of paragraph (b) of Part 1499.46 of Amendment No. 1 to Supplementary Regulation No. 11 of the General Maximum Price Regulation of April 28, 1942, insofar as it regulates the rates and charges of protestant and such other warehousemen and hereby requests that such subparagraph be changed to read as follows:

> Transportation of commodities by persons offering their services to the general public as common carriers by rail, water, motor, pipe line, or other means of conveyances and for storage

and warehousing and all other services incident thereto by persons offering their services to the general public as a public utility, rates charged for.

Dated at Washington, D. C., this 26th day of June 1942.

DAVIES WAREHOUSE COMPANY,
By L. A. BAILEY, *Its Vice President.*

REGINALD L. VAUGHAN,
Attorney for Protestant,
Mills Tower, San Francisco, California.

UNITED STATES OF AMERICA,
District of Columbia } ss.

L. A. Bailey, being first duly sworn, deposes and says that he is an officer of protestant Davies Warehouse Company, to wit, the Vice President thereof, and has signed the foregoing protest on behalf of that corporation; that said protest and the documents filed therewith were prepared in good faith; that he has read said protest and knows the contents thereof and the same is true of his own knowledge except as to the following matters which he is informed and believes to be true: that the increased rates prescribed by the Railroad Commission of the State of California in its Decision No. 35361 of May 12, 1942, were, are, and will continue to be necessary in order that protestant may continue to render adequate warehousing service to the general public.

(Sgd.) L. A. BAILEY.

Subscribed and sworn to before me this 26th day of June 1942.

[SEAL] (Sgd.) EDWIN M. LICHT,
Notary Public in and for the District of Columbia.

My commission expires June 30, 1946.

Office of Price Administration. Received June 26, 1942. Office of Secretary.

EXHIBIT "A"

Decision No. 35361

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

Application No. 24723

In the Matter of the Application of CALIFORNIA WAREHOUSE TARIFF BUREAU, L. A. Bailey, Agent, for authority to increase certain handling rates and accessorial charges of public warehouses in the City of Los Angeles, and vicinity, State of California

APPEARANCES

Arlo D. Poe, for applicant.

J. J. Deuel, for California Farm Bureau Federation, interested party.

Harry Cremeens, for Los Angeles Warehouse Co., interested party.

Gordon Ross, for Overland Terminal Warehouse Company, interested party.

I. W. Hamilton, for Pacific Commercial Warehouse, Inc., interested party.

W. H. Tyler, for Westland Warehouses, Inc., interested party.

C. O. Simpson, for Metropolitan Warehouse Co., interested party.

D. C. Fessenden, for California Warehouse Company, interested party.

Ben Smith, for Birch-Smith Storage Company, interested party.

Morris M. Cook, for Cook-McFarland Company, interested party.

A. O. Walde, for Davies Warehouse Co., interested party.

W. C. Elliott, for Bekins Van & Storage Co., interested party.

Nathan Nibley, for Jennings-Nibley Warehouse Co., Ltd., interested party.

B. F. Johnson, for Union Terminal Warehouse, interested party.

J. S. Miller, for Star Truck & Warehouse Co., interested party.

BY THE COMMISSION:

OPINION

By this application California Warehouse Tariff Bureau, through its agent, L. A. Bailey, seeks authority on behalf of its members operating in Los Angeles and vicinity to increase warehouse handling rates and certain incidental and accessorial charges, and to make the charges effective on ten days' notice.[1] No change is sought in rates for storage.

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[1] The warehousemen on whose behalf the application is filed are American Warehouse, Bekins Van Lines, Inc., Birch-Smith Storage Company, California Warehouse Co., Central Warehouse & Storage Co., H. G. Chaffee Warehouse Co., Citizens Warehouse, J. A. Clark Draying Co., Ltd., Colyear's Van & Storage Co., Cook-McFarland Warehouse Co., Davies Warehouse Company, Federal Ice & Cold Storage Co., Hollywood Storage Co., Jennings-Nibley Warehouse Co., Ltd., Los Angeles Warehouse Company, Metropolitan Warehouse Company, Modern Warehouses, Inc., Overland Terminal Warehouse Co., Pacific Coast Terminal Warehouse Company, Pacific Commercial Warehouse, Inc., Richards Trucking & Warehouse Co., Smith Bros. Truck Co., Star Truck & Warehouse Co., Union Terminal Warehouse, Western Warehouse & Transfer Co., Westland Warehouses, Inc. The

The matter was submitted at a public hearing had before Examiner Bryant at Los Angeles on February 13, 1942.

The proposed handling rates are uniformly 15 percent higher than those now in effect, subject to slight adjustments in the disposition of fractions.[2] The other incidental changes involve minimum monthly charges per customer, charges for payment of freight or express bills on outgoing shipments, and charges for sorting, weighing, clerical services, and the furnishing of special labor. The proposed increases in these charges are not uniform, but are generally in excess of 15 percent.

Applicant alleges that there has been no substantial change in the rates of the warehouses here involved since February 1, 1938; that the rates have not been sufficient to enable them to operate at a profit; that notwithstanding such condition, warehouse operating expenses have increased from time to time, particularly labor costs; that although operating revenues have recently increased due to an added volume of business, the increase has not been sufficient to offset the rise in operating expenses; and that the efficiency of public warehouse service in Los Angeles and vicinity may be seriously impaired unless applicant ware-

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warehouses are all situated in Los Angeles with the exception of Federal Ice & Cold Storage Co. and Westland Warehouses, Inc., which are located in Vernon; Hollywood Storage Co., which is located in Hollywood; and the warehouses of Bekins Van Lines, Inc., which are located in Beverly Hills, Santa Monica, Glendale, and Pasadena.

[2] The increases would be applied in accordance with a rate conversion table as set forth in Exhibit "A" to the application. The present rates and charges are published in California Warehouse Tariff Bureau Tariffs Nos. 7–C and 5–J, C. R. C. Nos. 102 and 94, respectively, of L. A. Bailey, Agent.

housemen are promptly authorized to increase rates and charges as sought herein.

Testimony in support of the application was presented by the secretary-treasurer of the Los Angeles Warehousemen's Association, by the manager of one of the applicant warehouses, and by a warehouse employee engaged to compile cost data for purposes of this proceeding. According to the testimony of these witnesses, the warehouse industry in the Los Angeles area has experienced a steady increase in operating expenses in recent years, due principally to the constant upward trend in wages for labor. Since 1938 wages have increased on four different occasions, and the employees have also been granted vacation and holiday privileges.[3] The total increase in cost to the warehouses for labor required to conduct their operations was stated to be between 20 and 26 percent. In addition, it was asserted that wages of clerical and supervisory employees have advanced, as has the cost of materials and supplies.

Studies of revenues and expenses of 14 of the 26 companies involved in this proceeding were submitted in evidence and explained by the cost witness. He stated that these 14 companies operate a major part of the warehouse space, and expressed the opinion that their figures were representative of those of all of the applicant warehousemen. The witness calculated that the labor expense alone for the warehouses studied would be $77,890 per year higher under present wage scales than under those paid in 1938, whereas additional revenue to be expected from the proposed in-

[3] Hourly wages for "regular" and "checker class" labor were 65 cents and 70 cents, respectively, on February 1, 1938. The present wage scales are 75 cents for "regular" labor and 80 to 85 cents for "checker class" labor.

crease in handling charges would be only $67,485. He asserted that the 14 warehousemen suffered a net loss from all warehouse operations of $70,571 during the first six months of 1941, despite an upward trend in their storage business and gross revenue.[4]

Subsequent to the hearing, applicant stipulated that the 1941 verified reports filed with the Commission might be considered part of the record. These reports contain a balance sheet and income statement for each warehouse. They show, among other things, that some of the warehousemen own and others rent their warehouse premises. In arriving at the loss shown above, rent paid is included in expenses. The rent paid includes an allowance for a return on the owner's investment in the property leased to an applicant and in some instances an allowance for depreciation and taxes. The warehousemen who own their buildings have no allowance for a return on their investment in their expenses. Obviously, operating expenses should not include a return on investment. At least two of applicants who rent all their warehouse buildings and who pay more than one-half of the rent paid by the 14 warehousemen, include in such rent, payments for both utility and nonutility properties. If one includes the rent received in revenues, the 14 warehousemen did not, in 1941, operate at a loss. In subsequent proceedings we will expect applicants to segregate their rent expenses in a manner so that we can determine the amount which represents a return on the investment in leased premises and the amount which represents operating expenses such as taxes and depreciа-

[4] During the same period in 1940 the loss was said to have been $85,064. The operating losses have been compensated by nonoperating revenues, so that the warehouses as a group have shown some net income.

tion, and we should also have evidence showing the cost of the premises leased.

No one appeared in opposition to the granting of this application, although over 3,000 notices of the proposed rate increases were said to have been distributed to customers of the warehousemen.

The order herein will permit applicants to increase their rates to reimburse them in part for their added labor expense. This will be done, however, subject to the condition that applicant, before accepting the benefits of this order, and before filing the increased rates authorized herein, will be required to agree that it will never urge before this Commission, in any reparation proceeding under Section 71 of the Public Utilities Act, or in any other proceeding, that the opinion and order herein has found that any individual rate is reasonable. It will be understood that any interested party may properly challenge by complaint and in the usual manner the reasonableness or lawfulness of any individual increases herein authorized, should such increases be regarded as unreasonable or in any other manner unlawful.

ORDER

This matter having been duly heard and submitted,

IT IS HEREBY ORDERED that California Warehouse Tariff Bureau be and it is hereby authorized on behalf of the warehousemen specifically named in the preceding opinion, subject to the condition set forth in said opinion, to establish on not less than ten (10) days' notice to the Commission and to the public, increased handling rates and incidental charges as set forth in Exhibits A and B attached to and made a part of the above-entitled application.

The authority herein granted is void unless exercised within ninety (90) days from the effective date hereof.

The effective date of this order shall be ten (10) days from the date hereof.

Dated at San Francisco, California, this 12th day of May 1942.

RAY L. RILEY,
C. C. BAKER,
FRANK R. HAVENNER,
RICHARD SACHSE,
Commissioners.

Certified as a true copy:

[SEAL] H. G. MATHEWSON,
Secretary, Railroad Commission, State of California.

EXHIBIT "B"

UNITED STATES OF AMERICA,
District of Columbia, ss:

L. A. BAILEY, being first duly sworn, deposes and says that his post office address is 216 Pine Street, San Francisco, California; that his occupation is President and Executive Manager of Pacific States Cold Storage Warehousemen's Association, Secretary of California Warehousemen's Association, Secretary of the Warehousemen's Association of the Port of San Francisco, Tariff Agent of the Los Angeles Warehousemen's Association as well as the Tariff Agent for numerous public utility warehousemen operating within the State of California; that his business connection with protestant is that of Vice President and warehouse Tariff Agent; that the evidence, the presentation of which is subject to the control of the protestant and upon which the protestant relies in support of the facts alleged in the protest, consists of the allegations contained in the protest to the effect that:

(a) protestant is a public utility warehouseman as defined by and under the Constitution of the State of California and the Public Utilities Act of California and, as such public utility, is subject to the jurisdiction and control of the Railroad Commission of the State of California with respect to its rates and charges as well as with respect to its services to the public generally;

(b) protestant is subject to the burdens of the laws of the State of California and is entitled to the benefits thereof;

(c) under and by virtue of Decision No. 35361 of the Railroad Commission of the State of California,

of May 12, 1942, in Application No. 24723, your protestant was authorized to increase its charges for handling and certain minor accessorial services rendered by it as a public utility;

(d) such increased charges became effective on June 1, 1942, and have been since that date and are the charges which your petitioner is assessing and collecting for such services, except for minor modifications authorized by the California Railroad Commission;

(e) such increased charges were and are necessary by reason principally of increased cost of labor as alleged in said protest;

(f) the warehousing services of your protestant are demanded in the public interest, particularly during the War Emergency period;

(g) it is in the public interest that protestant's warehousing services be maintained in full vigor which would be put in jeopardy unless protestant is allowed to continue in effect the rates as authorized in said Decision No. 35361;

(h) because the rates and charges of protestant are regulated by the Railroad Commission of the State of California they cannot be considered to be inflationary, particularly as to the aforesaid increased charges authorized by said Decision No. 35361 and, furthermore, except for minor modifications the rates and charges for warehousing services of protestant prior to the increases authorized and established under said Decision 35361, the rates and charges were those published and filed with the Commission and effective since the early part of 1938;

(i) said increased charges are and will be necessary in order that your protestant may continue to render adequate warehousing service to the general public and that unless protestant is permitted to main-

tain its present general basis of rates and charges for handling services in connection with the storage of commodities at its warehouses it will be confronted with serious financial difficulties that will be adverse to the best interests of its public service.

The facts set forth in (a) to (h) above are within the personal knowledge of affiant whereas the facts set forth in (i) above are based upon information and belief.

Affiant has been tariff publishing agent for protestant and many other public utility warehousemen in California for over 15 years and the sources of his knowledge of facts (a) to (i) inclusive above are based upon what he has learned as such tariff agent. Your affiant bases his knowledge upon his general knowledge and is not able to state in detail the sources of his information as to each fact heretofore alleged.

(Sgd.) L. A. BAILEY.

Subscribed and sworn to before me this 26th day of June 1942.

[SEAL] (Sgd.) EDWIN M. LICHT,
Notary Public in and for the District of Columbia.

My commission expires June 30, 1946.

EXHIBIT "C"

UNITED STATES OF AMERICA,
District of Columbia, ss:

L. A. BAILEY, being first duly sworn deposes and says that he is making this affidavit on behalf of protestant and as Vice President thereof and that the purpose of this affidavit is to comply with the requirements of Rule 15 (b) of Procedural Regulation No. 1 of the Office of Price Administration; that the further evidence upon which he believes he can rely in support of the facts alleged in the protest and which is not subject to his control but which he believes to be true relates:

(a) to the allegations contained in said protest to the effect that all warehousemen who are under the jurisdiction and control of the Railroad Commission of the State of California (under and by virtue of Sections 2 (dd) and 2½ of the Public Utilities Act of California, and Section 33 of Article IV and Section 23 of Article XII of the Constitution of California) are public utilities in the same general class of business as protestant, and

(b) to all allegations of fact contained in said protest other than the allegations in (a) above and the facts set forth in the affidavit of affiant attached to the protest as Exhibit "B".

(Sgd.) L. A. BAILEY.

Subscribed and sworn to before me this 26th day of June 1942.

[SEAL] (Sgd.) EDWIN M. LICHT,
Notary Public in and for the District of Columbia.
My commission expires June 30, 1946.

[ORDER DENYING PROTEST]

UNITED STATES OF AMERICA

BEFORE THE OFFICE OF PRICE ADMINISTRATION

Docket No. GF1–428–P

In the Matter of

DAVIES WAREHOUSE COMPANY, PROTESTANT

ORDER DENYING PROTEST

On June 26, 1942, Davies Warehouse Company, a California corporation of 126 South Central Avenue, Los Angeles, California, filed a Protest against the provisions of the General Maximum Price Regulation. Due consideration has been given to the Protest, and an opinion in support of this Order has been issued simultaneously herewith and filed with the Division of the Federal Register.

For the reasons set forth in the opinion, under the authority vested in the Price Administrator and in accordance with the Emergency Price Control Act of 1942 and Procedural Regulation No. 1, it is ordered that Protest No. GF1–428–P be, and it hereby is, denied.

Issued and effective this 27 day of July 1942.

(Sgd.) LEON HENDERSON,
Leon Henderson,
Administrator.

[OPINION]

UNITED STATES OF AMERICA

BEFORE THE OFFICE OF PRICE ADMINISTRATION

Docket No. GF1-428-P

In the Matter of

DAVIES WAREHOUSE COMPANY, PROTESTANT

OPINION ACCOMPANYING ORDER DENYING PROTEST

On June 26, 1942, Davies Warehouse Company, a California corporation, herein called Protestant, filed a Protest to the General Maximum Price Regulation, to Supplementary Regulation No. 11 thereto, and to Amendment No. 1 to said Supplementary Regulation No. 11. The General Maximum Price Regulation, in substance, prohibits sales of all but certain excepted commodities and services at prices higher than those charged by the seller during March. Supplementary Regulation No. 11 provides that the General Maximum Price Regulation should not apply to certain listed services, among them, "commercial storage and warehousing and services incident thereto" until July 1, 1942. Amendment No. 1 to Supplementary Regulation No. 11 provides for exception of certain services from the General Maximum Price Regulation, but states expressly that "charges for storage and warehousing and all other services incident thereto by any person shall not be excluded from the General Maximum Price Regulation."

Protestant alleges that it is a "public utility" within the meaning of Section 302 (e) (2) of the Emergency

Price Control Act of 1942 and that it is therefore not subject to the provisions of the General Maximum Price Regulation. Section 302 (c) (2) exempts from regulation "rates charged by any common carrier or other public utility." Protestant's position is predicated upon the inclusion of a warehouseman in the term "public utility" as defined in Section 2 (dd) of the California Public Utilities Act (Statutes of California, 1915, Chapter 91, as amended) and the declaration in Article XII, section 23 of the California Constitution that any private corporation furnishing storage facilities to the public is a public utility. Disposition of this protest, therefore, depends entirely upon the construction of the phrase "public utility" as used in Section 302 of the Price Control Act.

The Administrator has heretofore exempted from the General Maximum Price Regulation those businesses which are universally regarded as public utilities and which are regulated as such in most states. Protestant does not contend that all public warehouses are entitled to similar exemption as "public utilities." Nor could it do so, since it is clear that the Act was intended to apply to warehouses. Section 302 (c) defines the term "commodity" as including "services rendered * * * in connection with the * * * storage * * * of a commodity." If the Price Administrator had no authority to establish maximum prices for public warehousemen this provision would be rendered in large part meaningless, since the bulk of "storage" services is rendered by public warehousemen.

Protestant's contention is that it and similar storage companies in California are "public utilities" within the meaning of the Act, by virtue of the fact that they are so designated by the statutes and Constitution of that state. However, the fact that Protestant is

engaged in a business which is described as that of a "public utility" by the Constitution and laws of the State of California is not controlling in determining the proper construction of the phrase "public utility" as used in Section 302 of the Emergency Price Control Act. That statute is nation-wide in application and must of necessity be interpreted so as to authorize uniform exercise of the authority vested in the Price Administrator with respect to any given industry in every part of the country. Section 302 (c) (2) is unqualified and contains no indication, either express or implied, that the exemption is to extend to certain classes of business in one state but not in another, depending on the existence and scope of local regulation. This is particularly significant so far as warehouses are concerned, since many states exercise no regulation over warehouses, others only require licenses, still others prescribe varying degrees of control over rates and services, while only a very few subject them to regulation as public utilities in the full sense of the term.

It does not follow, however, that the Administrator may not give appropriate consideration to the determinations of state regulatory agencies in passing upon applications for adjustment of particular maximum prices. In this connection it should be noted that the protestant and certain other California warehousemen have also filed petitions for amendment under section 19 of the General Maximum Price Regulation requesting *inter alia* that their maximum prices be increased to levels theretofore approved by the California Railroad Commission, after extensive public hearings.

The Price Administrator is now considering these petitions on the basis of the showing made therein and in the light of the fact that the California Railroad

Commission has approved the rate increases requested.

For the foregoing reasons this protest should be denied.

Issued and effective this 27th day of July, 1942.

(Sgd.) LEON HENDERSON,
Leon Henderson,
Administrator.

481910—42——3

THE GENERAL MAXIMUM PRICE REGULATION*

Findings of the Price Administrator

In the judgment of the Price Administrator the prices of commodities and services generally have risen and are threatening further to rise to an extent and in a manner inconsistent with the purposes of the Emergency Price Control Act of 1942.

In the judgment of the Price Administrator the maximum prices established by this Regulation, which apply with certain exceptions to all commodities and services not otherwise subject to regulation, are generally fair and equitable and are necessary to check inflation and to effectuate the purposes of the Act.

So far as practicable the Price Administrator gave due consideration to prices prevailing between October 1 and 15, 1941, and to relevant factors of general applicability. So far as practicable the Price Administrator consulted with representatives of trade and industry.

A statement of the considerations involved in the issuance of this Regulation is issued simultaneously herewith.

Therefore, under the authority vested in the Price Administrator by the Emergency Price Control Act of 1942, this General Maximum Price Regulation is hereby issued.

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*Issued April 28, 1942 (7 F. R. 3153). Corrected, 7 FR 3330; as amended, 7 FR 3666, 3990, 3991, 4339, 4487, 4659, 4738, 5027, 5192, 5276, 5365, 5445, 5484, 5565, 5775, 5784, 5783, 6058, 6081, 6216.

Maximum prices

Note: The meaning of certain provisions and terms of this Regulation is further explained and defined in Section 20. The explanations and definitions are set forth in alphabetical order. The terms explained and defined are underlined the first time they appear in the text.

§ 1 [§ 1499.1] *Prohibition against dealing in commodities or services above maximum prices.* On and after the effective date of this Regulation, regardless of any contract or other obligation:

(a) No person shall sell or deliver any commodity, and no person shall sell or supply any service, at a price higher than the maximum price permitted by this Regulation; and

(b) No person in the course of trade or business shall buy or receive any commodity or service at a price higher than the maximum price permitted by this Regulation.

(c)[1] The provisions of paragraph (b) of this section shall not be applicable to any war procurement agency or any contracting or paying finance officer thereof and any such agency or contracting or paying finance officer shall be relieved of any and every liability, civil or criminal, imposed by this General Maximum Price Regulation or by the Emergency Price Control Act of 1942. "War procurement agency" as used in this paragraph, includes the War Department, the Department of the Navy, the United States Maritime Commission, and the Lend-Lease Section of the Procurement Division of the Treasury Department, or any agency of any of the foregoing.

§ 2 [§ 1499.2] *Maximum prices for commodities and services: general provisions.* Except as otherwise pro-

[1] Added by Amdt. No. 7, 6-19-42, 7 FR 4659.

vided in this Regulation, the seller's maximum price for any commodity or service shall be:

(a) *In those cases in which the seller dealt in the same or similar commodities or services during March 1942:*

The highest price charged by the seller during such month—

(1) For the same commodity or service; or

(2) If no charge was made for the same commodity or service, for the similar commodity or service most nearly like it; or

(b) *In those cases in which the seller did not deal in the same or similar commodities or services during March 1942:*

The highest price charged during such month by the most closely competitive seller of the same class—

(1) For the same commodity or service; or

(2) If no charge was made for the same commodity or service, for the similar commodity or service most nearly like it.

"Highest price charged during March 1942"

For the purposes of this Regulation, the highest price charged by a seller "during March 1942" shall be:

(1) The highest price which the seller charged for a commodity delivered or service supplied by him during March 1942; or

(2) If the seller made no such delivery or supplied no such service during March 1942 his highest offering price for delivery or supply during that month.

No seller shall change his customary allowances, discounts or other price differentials unless such change results in a lower price. The "highest price charged" shall be a price charged during March 1942 to a pur-

chaser of the same class. But if during March 1942 a seller (a) had an established practice of making allowances, discounts or price differentials to different classes of purchasers, and (b) raised his general level of prices, but thereafter during March 1942 made no delivery to any purchaser of a particular class, he shall, for that particular class of purchasers calculate the highest price charged by taking the highest price charged during March 1942 to a purchaser of another class and then adjusting such price to reflect his established allowances, discounts and price differentials. No seller shall require any purchaser, and no purchaser shall be permitted, to pay a larger proportion of transportation costs incurred in the delivery or supply of any commodity or service, than the seller required purchasers of the same class to pay during March 1942 on deliveries or supplies of the same or similar types of commodities or services.

"Similar commodities or services"

One commodity shall be deemed "similar" to another commodity, if the first has the same use as the second, affords the purchaser fairly equivalent serviceability, and belongs to a type which would ordinarily be sold in the same price line. In determining the similarity of such commodities, differences merely in style or design which do not substantially affect use, or serviceability, or the price line in which such commodities would ordinarily have been sold, shall not be taken into account. One service shall be deemed "similar" to another service if the first has the same use and purpose as the second and belongs to a type which would ordinarily be sold for the same or substantially the same price.

Special provisions

The maximum prices established by this section for certain commodities or services or in certain transactions may be modified by supplementary regulation issued under this section.[2]

§ 3 [§ 1499.3] *Maximum prices for commodities which cannot be priced under section 2.* The seller's maximum price for a commodity which cannot be priced under section 2 of this Regulation shall be a maximum price in line with the level of maximum prices established by this Regulation. Such price shall be determined by the seller in accordance with the following procedures:

(a) *Sales at wholesale or retail.* In the case of a sale at wholesale or retail, the seller (1) shall select from the same general classification and price range as the commodity being priced under this section, the comparable commodity for which a maximum price is established under section 2 of this Regulation and of which the seller delivered the largest number of units during March 1942; (2) shall divide his maximum price for that commodity by his replacement cost of that commodity; and (3) shall multiply the percentage so obtained by the cost to him of the commodity being priced under this paragraph. The resulting figure shall be the maximum price of the commodity being priced. Within ten days after determining such maximum price under this paragraph, the seller shall report such price to the appropriate field office of the Office of Price Administration upon a form, duly filled out and signed under oath or affirmation, copied from the form contained in Appendix A of this Regulation.

[2] Heading and paragraph added by Amdt. No. 15, 7-15-42, 7 FR 5484.

The price so reported shall be subject to adjustment at any time by the Office of Price Administration.

(b) *Sales other than at wholesale or retail.* In the case of a sale other than at wholesale or retail, the maximum price shall be a price determined by the seller after specific authorization from the Office of Price Administration. A seller who seeks an authorization to determine a maximum price under the provisions of this paragraph shall file with the Office of Price Administration in Washington, D. C., an application setting forth (1) a description in detail of the commodity for which a maximum price is sought; and (2) a statement of the facts which differentiate such commodity from other commodities delivered during March 1942 by such seller and by other competitive sellers of the same class. If such authorization is given, it will be accompanied by instructions as to the method for determining the maximum price. Within ten days after such price has been determined, the seller shall report the price to the Office of Price Administration in Washington, D. C., upon a form, duly filled out and signed under oath or affirmation, which will be furnished him. The price so reported shall be subject to adjustment at any time by the Office of Price Administration.

§ 4 [§ 1499.4] *Supplemental Regulations.* If the maximum prices established for any commodity under the provisions of this Regulation fail equitably to distribute returns from the sale at retail of such commodity among producers, manufacturers, wholesalers and retailers, the Price Administrator will by supplementary regulation establish such maximum prices for different classes of sellers, or fix such base periods for the determination of their maximum prices, as will insure that each such class of sellers shall receive a fair share of such return.

§ 4a [§ 1499.4a] [3] *Determination of maximum prices by sellers at retail operating more than one retail establishment.* A seller who owns more than one establishment selling commodities at retail and who has had a fixed practice, which prevailed during March 1942, of selling commodities at retail at uniform or at substantially uniform prices in all such establishments or in all such establishments located in a particular area may make written application to the Office of Price Administration, Retail Trade and Services Division, Washington, D. C., for authorization to determine and use uniform maximum prices under this General Maximum Price Regulation in all of such establishments in which it has been the practice to charge uniform or substantially uniform prices. Such application shall state (a) the name and address of the principal office of the seller; (b) the number of separate retail establishments owned by the seller and the address of each such establishment; (c) the kind of merchandise carried in such retail establishments; (d) whether commodities are purchased centrally by the seller and distributed by the seller to such retail establishments or are purchased separately by such establishments; (e) a description of the fixed practice of the seller of selling commodities at uniform or substantially uniform prices in all such retail establishments or in all such retail establishments located in particular areas indicating the length of time during which such practice has been in effect and whether uniform selling prices are determined in a central office; (f) the names and addresses of the seller's most closely competitive sellers of the same class on a national or regional basis; and (g) any other facts which the seller wishes to submit in support

[3] Added by Amdt. No. 12, 7-11-42, 7 FR 5365.

of the application. If such authorization is given, it will be accompanied by instructions as to the method by which the seller may determine and use uniform maximum prices under this General Maximum Price Regulation.

§ 4b [§ 1499.4b] [1] *Adjustment of maximum prices in cases of special deals.* Any seller, other than a seller at retail, whose maximum price for a commodity to purchasers of a particular class is based on a "special deal" given by him to such purchasers which he can demonstrate was to have terminated not more than 123 days from the date on which it first became effective, may adjust his maximum price to such purchasers to the highest price at which such commodity was delivered by him to a purchaser of that class during the 30 days immediately preceding the date on which the special deal first became effective.

A seller at retail whose maximum price for a commodity to purchasers of a particular class is based on a special deal given by him to such purchasers as the result of a special deal given to him by his supplier may adjust his maximum price to such purchasers to the highest price at which such commodity was delivered by him to a purchaser of that class during the 30 days immediately preceding the date on which the special deal given by him first became effective. Such adjusted maximum price shall not apply to the particular commodities purchased by the retailer under the special deal given to him by his supplier.

The words "special deal," as used in this section, mean any reduction in the price of a commodity to purchasers of a particular class from the price in effect for purchasers of that class on the day immediately preceding the date on which the special deal first

[1] Added by Amdt. No. 14, 7-17-42, 7 FR 5565.

became effective, including but not limited to a reduction in such price resulting from offers of free goods, combination sales, and increased quantity and other discounts to purchasers of such class.

A seller who makes an adjustment in his maximum price pursuant to this section shall, within 10 days thereafter, submit a statement to the regional office of the Office of Price Administration for the region in which the seller's place of business is located, except that if the seller makes sales of the commodity in more than one region, the statement shall be submitted to the Office of Price Administration, Washington, D. C. Such statement shall set forth:

(a) The seller's maximum price for the commodity prior to the adjustment permitted by this section;

(b) A description of the special deal given by the seller including all the terms thereof, the class or classes of purchasers to which it was applicable, the dates during which it was in effect, and copies of price lists, advertisements and trade announcements pertaining to such special deal;

(c) In the case of a seller at retail, a description of the special deal given to him by his supplier including all the terms thereof, the dates during which it was in effect and copies of price lists and trade announcements pertaining to such special deal;

(d) In the case of a seller other than a seller at retail, detailed evidence demonstrating that the special deal was to have terminated on or before a date not more than 123 days from the date on which the special deal first became effective;

(e) The adjusted maximum price established by the seller pursuant to this section; and

(f) A description of all prices and terms of payment which the seller has had in effect for the commodity since January 1, 1941.

The adjusted maximum price reported by the seller pursuant to this section shall be subject to adjustment at any time by the Office of Price Administration.

§ 5 [§ 1499.5] *Transfers of business or stock in trade.* If the business, assets or stock in trade of any business are sold or otherwise transferred after April 28, 1942, and the transferee carries on the business, or continues to deal in the same type of commodities or services, in an establishment separate from any other establishment previously owned or operated by him, the maximum prices of the transferee shall be the same as those to which his transferor would have been subject if no such transfer had taken place, and his obligation to keep records sufficient to verify such prices shall be the same. The transferor shall either preserve and make available, or turn over, to the transferee all records of transactions prior to the transfer which are necessary to enable the transferee to comply with the record provisions of this Regulation.

§ 6 [§ 1499.6] *Sales for export.* The maximum price at which a person may export any commodity shall be determined in accordance with the provisions of the Maximum Export Price Regulation issued by the Office of Price Administration on April 25, 1942.

§ 7 [§ 1499.7][5] *Federal and state taxes.* Any tax upon, or incident to, the sale, delivery, processing, or use of a commodity, or the supplying of a service, imposed by any statute of the United States or statute or ordinance of any state or subdivision thereof, shall be treated as follows in determining the seller's maximum price for such commodity or service and in preparing the records of such seller with respect thereto:

(a) *As to a tax in effect during March 1942.* (1) If the seller paid such tax, or if the tax was paid by

[5] Amended by Amdt. No. 7, 6–19–42, 7 FR 4659.

any prior vendor, irrespective of whether the amount thereof was separately stated and collected from the seller, but the seller did not customarily state and collect separately from the purchase price during March 1942 the amount of the tax paid by him or tax reimbursement collected from him by his vendor, the seller may not collect such amount in addition to the maximum price, and in such case shall include such amount in determining the maximum price under this General Maximum Price Regulation.

(2) In all other cases if, at the time the seller determines his maximum price, the statute or ordinance imposing such tax does not prohibit the seller from stating and collecting the tax separately from the purchase price, and the seller does state it separately, the seller may collect, in addition to the maximum price, the amount of the tax actually paid by him or an amount equal to the amount of tax paid by any prior vendor and separately stated and collected from the seller by the vendor from whom he purchased, and in such case the seller shall not include such amount in determining the maximum price under this General Maximum Price Regulation.

(b) *As to a tax or increase in a tax which becomes effective after March 31, 1942.* If the statute or ordinance imposing such tax or increase does not prohibit the seller from stating and collecting the tax or increase separately from the purchase price, and the seller does separately state it, the seller may collect, in addition to the maximum price, the amount of the tax or increase actually paid by him or an amount equal to the amount of tax paid by any prior vendor and separately stated and collected from the seller by the vendor from whom he purchased.

§ 8 [§ 1499.8] *Less than maximum prices.* Lower prices than those established by this Regulation may be charged, demanded, paid or offered.

Commodities and services excepted from this regulation

§ 9 [§ 1499.9] *Commodities excepted from this General Maximum Price Regulation.* (a) This General Maximum Price Regulation shall not apply to sales or deliveries of the following commodities:

(1) Any raw and unprocessed agricultural commodity or greenhouse commodity while it remains in substantially its original state, except that dried fruits and dried berries (other than dried prunes and other than sales or deliveries "in natural condition" by growers to packers), bananas, and dried imported agricultural commodities, shall be governed by this General Maximum Price Regulation.[6]

(2) Eggs and poultry.

(3) All milk products, including butter, cheese, condensed and evaporated milk, except that fluid milk sold at wholesale and [6a] retail, cream sold at wholesale and [6] retail, and ice cream shall be governed by this General Maximum Price Regulation.

(4) Flour, cake mixes, and flour mixes, except that packaged cake mixes and flour mixes shall be governed by this General Maximum Price Regulation.[7]

(5) Mutton and lamb.

(6) Fresh fish and seafood, and game.

(7)[8] Dried prunes, dry edible beans, leaf tobacco (whether dried or green), all nuts and peanuts, except cleaned or raw shelled peanuts harvested from the

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[6] Amended by Amdt. No. 4, issued 6-5-42, 7 FR 4339.

[6a] Words "wholesale and" added by Amdt. No. 21, 8-1-42, 7 FR 6007.

[7] Amended by Amdt. No. 2, issued 5-27-42, 7 FR 3990.

[8] Amended by Amdt. No. 16, 7-24-42, 7 FR 5775.

1941 crop, all salted peanuts and peanut butter, linseed oil, linseed cake and linseed meal, manure and mixed feed for animals, except that cat and dog foods shall be governed by this General Maximum Price Regulation.

(8) Living animals, whether wild or domestic.

(9) Books, magazines, motion pictures, periodicals, newspapers, and materials furnished for publication by any press association or feature service.

(10) Domestic ores and ore concentrates.

(11) Stumpage, logs, and pulpwood.

(12) Stamps and coins; precious stones and mountings into which precious stones are set;[9] antiques and knotted oriental rugs; paintings, etchings, sculptures and other objects of art.

(13) Used automobiles.

(14) Wood and gum for naval stores and gum naval stores.[10]

(15) Securities.

(16) Such other commodities as may be specified by supplementary regulations issued under this section.

(b) This Regulation shall not apply to the following sales or deliveries:

(1) By a farmer, of commodities grown and processed on his farm, if the total of such sales or deliveries does not exceed $75 in any one calendar month.

(2) By any merchant, farmer, artisan, or person who renders professional services, of his used supplies, or business, farm, or professional equipment, not acquired or produced by him for the purpose of sale.

(3) By an owner, of his used personal or household effects or other personal property used by him.

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[9] Words following "precious stones" added by Amdt. No. 9, 6-30-42, 7 FR 5027.

[10] Amended by Amdt. No. 5, 6-12-42, 7 FR 4487.

(4) At a bona fide auction of used household or personal effects.

(5) By hotels, restaurants, soda fountains, bars, cafes, or other similar establishments, of food or beverages prepared and sold for consumption on the premises.

(6) By a breeder, trapper, or hunter, of pelts, furs, or other parts of wild animals raised by him, or trapped, shot, or killed by him, if the total of such sales or deliveries does not exceed $75 in any one calendar month.

(7) Of commodities sold without private profit in the course of any sale, fair, or bazaar conducted for a period of not more than 15 days by any religious, charitable, or philanthropic organization.

(8) To the United States or any agency thereof of such commodities or in such transactions as may be specified by supplementary regulations issued under this section.

(9) Such other sales and deliveries as may be specified by supplementary regulations issued under this section.

§ 10 [§ 1499.10] [11] *Services excepted from this General Maximum Price Regulation.* The provisions of this General Maximum Price Regulation shall not apply to such services as may be specified by supplementary regulations issued under this section or by any amendments thereto.

Records

§ 11 [§ 1499.11] *Base-period records.* Every person selling commodities or services for which, upon sale by that person, maximum prices are established by this Regulation, shall:

[11] Amended by Amdt. No. 8, 6-23-42, 7 FR 4738.

(a) Preserve for examination by the Office of Price Administration all his existing records relating to the prices which he charged for such of those commodities or services as he delivered or supplied during March 1942, and his offering prices for delivery or supply of such commodities or services during such month; and

(b) Prepare, on or before July 1, 1942, on the basis of all available information and records, and thereafter keep for examination by any person during ordinary business hours, a statement showing:

(1) The highest prices which he charged for such of those commodities or services as he delivered or supplied during March 1942 and his offering prices for delivery or supply of such commodities or services during such month, together with an appropriate description or identification of each such commodity or service; and

(2) All his customary allowances, discounts, and other price differentials.

Any person, other than a person selling at retail, who claims that substantial injury would result to him from making such statement available to any other person, may file it with the appropriate field office of the Office of Price Administration. The information contained in such statement will not be published or disclosed unless it is determined that the withholding of such information is contrary to the purposes of this Regulation.

§ 12 [§ 1499.12] *Current records.* Every person selling commodities or services for which, upon sale by that person, maximum prices are established by this Regulation shall keep, and make available for examination by the Office of Price Administration, records of the same kind as he has customarily kept, relating to the prices which he charged for such of those com-

modities or services as he sold after the effective date of this Regulation; and, in addition, records showing, as precisely as possible, the basis upon which he determined maximum prices for those commodities or services.

§ 13 [§ 1499.13] *Maximum prices of cost-of-living commodities: statement, marking or posting.* For the purposes of this section, a cost-of-living commodity is any commodity designated as such by the Price Administrator. A list of the classes of commodities so designated appears in Appendix B of this Regulation.

(a) On and after May 18, 1942, every person offering to sell a cost-of-living commodity at retail shall mark the maximum price of such commodity in a manner plainly visible to, and understandable by, the purchasing public. The maximum price may be marked on the commodity itself or on the shelf, bin, rack, or other holder or container upon or in which the commodity is kept, or it may be posted at the place in the business establishment where the commodity is offered for sale. Provided,[11a] That whichever of the above methods of posting is adopted, the maximum price of each commodity offered for sale shall be plainly visible to the purchaser at the place in the business establishment where the commodity is offered for sale, and shall not be obscured by the posted prices of other commodities, whether by use of price books or catalogues or layers of price lists or otherwise or in any other manner. The maximum price shall be stated as follows: "Ceiling Price $—.—;" or "Our Ceiling $—.—." Any person choosing to post by price-lines the maximum prices of commodities in the classifications marked by asterisks in Appendix B shall post the maximum price by price-line at the place in the

[11a] Proviso added by Amdt. No. 18, 7-25-42, 7 FR 5783.

business establishment where the commodities in such price-line are offered for sale, and, in addition, shall mark the selling price of each such commodity on the commodity itself.

(b) On or before July 1,[12] 1942, every person offering to sell cost-of-living commodities at retail shall file with the appropriate War Price and Rationing Board of the Office of Price Administration a statement showing his maximum price for each such commodity, together with an appropriate description or identification of it. Such statement shall be kept up to date by such person by filing on the tenth[13] day of every succeeding month a statement of his maximum price for any cost-of-living commodity newly offered for sale during the previous month, together with an appropriate description or identification of the commodity.

§ 14 [§ 1499.14] *Sales slips and receipts.* Any seller who has customarily given a purchaser a sales slip, receipt, or similar evidence of purchase shall continue to do so. Upon request from a purchaser any seller, regardless of previous custom, shall give the purchaser a receipt showing the date, the name and address of the seller, the name of each commodity or service sold, and the price received for it.

Registration and enforcement

§ 15 [§ 1499.15] *Registration.*—Every person selling at wholesale, and every person who owns, or hereafter becomes the owner of, any business operating an establishment selling at retail any commodity or service for which a maximum price is established by this General Maximum Price Regulation or by any other

[12] Amdt. No. 1, issued 5-12-42, 7 FR 3666, changed "June 1" to "July 1."

[13] Amended by Amdt. No. 11, 7-6-42, 7 FR 5192.

price regulation of the Office of Price Administration shall register with the Office of Price Administration[14] at such time and in such manner as the Administrator may hereafter by regulation prescribe, on forms which will be made available by the Office of Price Administration.

§ 16 [§ 1499.16] *Licensing.* Every person selling at wholesale or retail any commodity or service for which a maximum price is established by the General Maximum Price Regulation or by any other price regulation of[15] the Office of Price Administration is by the General Maximum Price Regulation granted a license as a condition of selling any such commodity or service. The provisions of the General Maximum Price Regulation and of every price regulation of the Office of Price Administration to which this section now is or may hereafter become applicable shall be deemed to be incorporated in the license hereby granted, and any violation of any provision so incorporated shall be a violation of the provisions of said license.[15a] Such license shall be effective on the effective date of the General Maximum Price Regulation or when any such person becomes subject to the maximum price provisions of this or any other price regulation, and shall, unless suspended in accordance with the provisions of the Emergency Price Control Act of 1942, remain in effect as long as such regulation, or any applicable part, amendment, or supplement remains in effect.

§ 17 [§ 1499.17] *Penalties.* Persons violating any provision of this Regulation are subject to the criminal penalties, civil enforcement actions, and suits for treble damages provided for by the Emergency Price

[14] Amended by Amdt. No. 7, 6-19-42, 7 FR 4659.
[15] Amended by Amdt. No. 7, 6-19-42, 7 FR 4659.
[15a] Sentence added by Amdt. No. 20, 8-4-42, 7 FR 6084.

Control Act of 1942, and proceedings for the suspension of licenses.

Procedure for adjustment or amendment

§ 18 [§ 1499.18] [16] *Applications for adjustment.*— (a) The Office of Price Administration, or any duly authorized officer thereof, may by order adjust the maximum price established under this General Maximum Price Regulation for any seller at retail in any case in which such seller shows:

(1) That such maximum price is abnormally low in relation to the maximum prices of the same or similar commodities established for other sellers at retail; and

(2) That this abnormality subjects him to substantial hardship.

Applications for adjustment under this paragraph (a) shall be filed in accordance with Temporary Procedural Regulation No. 2.

(b) The Office of Price Administration, or any duly authorized officer thereof, may by order adjust the maximum price established under this General Maximum Price Regulation for any seller other than a seller at retail in any case in which such seller shows:

(1) That such maximum price causes him substantial hardship and is abnormally low in relation to the maximum prices established for competitive sellers of the same or similar commodities; and

(2) That establishing for him a maximum price bearing a normal relation to the maximum prices established for competitive sellers of the same or similar commodities, will not cause or threaten to cause an increase in the level of retail prices.

Applications for adjustment under this paragraph (b) shall be filed in accordance with Procedural Regulation No. 1.

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[16] Amended by Amdt. No. 10, 7-9-42, 7 FR 5276.

(c) Any person seeking relief, for which no provision is made in the foregoing paragraphs (a) and (b) of this section, from a maximum price established under this General Maximum Price Regulation may present the special circumstances of his case in an application for an order of adjustment. Such an application shall be filed in accordance with Procedural Regulation No. 1 and shall set forth the facts relating to the hardship to which such maximum price subjects the applicant together with a statement of the reasons why he believes that the granting of relief in his case and in all like cases will not defeat or impair the policy of the Emergency Price Control Act of 1942 and of this General Maximum Price Regulation to eliminate the danger of inflation.

This section shall apply to all maximum price regulations which have incorporated § 1499.18 in their provisions.

§19 [§ 1499.19] *Petitions for amendment.* Any person seeking a modification of any provision of this Regulation, or an adjustment not provided for in section 18 of this Regulation, may file a petition for amendment in accordance with the provisions of Procedural Regulation No. 1 issued by the Office of Price Administration.

Definitions and explanations

§ 20 [§ 1499.20] *Definitions and explanations.* This General Maximum Price Regulation, and the terms appearing therein, unless the context otherwise requires, shall be construed as follows:

(a) *Appropriate Field Office of the Office of Price Administration.* "Appropriate field office of the Office of Price Administration" means the district office for the district (or in the absence of such district office, the state office for the State) in which is

located the seller's place of business from which his sales are made.

(*b*) *Appropriate War Price and Rationing Board.* "Appropriate War Price and Rationing Board" means the War Price and Rationing Board for the area in which is located the seller's place of business from which the cost-of-living commodities are offered for sale.

(*c*) *Commodity.* "Commodity" includes commodities, articles, products, and materials and contracts to buy, sell, or deliver any of the foregoing.[17]

(*d*) *Delivered.* A commodity shall be deemed to have been "delivered" during March 1942, if during such month it was received by the purchaser or by any carrier, including a carrier owned or controlled by the seller, for shipment to the purchaser.

(*e*) *Establishment Selling at Retail.* Establishment refers to the physical location of the store, shop, or other place of business in which commodities or services are sold. Any such establishment shall be deemed to be selling at retail if it has an established practice of making sales at retail.

(*f*) *Mixed Feed.* "Mixed feed" includes a mixture or blend of more than one feed ingredient for the purpose of feeding animals, except screenings as defined in the Official Publication of the Association of American Feed Control Officials Incorporated for 1942 and except a mixed feed resulting from the blending or mixing of offals or byproducts from a single vegetable, plant or other agricultural products.[18]

(*g*) *Most Closely Competitive Seller of the Same Class.* "Seller of the same class" means a seller (1)

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[17] Words "but does not include real property" stricken by Amdt. No. 8, 6-23-42, 7 FR 4738.

[18] Amended by Amdt. No. 7, 6-19-42, 7 FR 4659.

performing the same function (for example, manufacturing, distributing, retailing, processing, storing, installing, or repairing), (2) of similar type (for example, department store, mail order house, chain store, specialty shop, cut-rate store), (3) dealing in the same type of commodities or services, and (4) selling to the same class of purchaser. A seller's "most closely competitive seller of the same class" shall be a seller of the same class who (a) is selling the same or a similar commodity or service [19] and (b) is closely competitive in the sale of such commodities or services [19] and (c) is located nearest to the seller.

(*h*) *Offering Price.* "Offering price" means the price quoted in the seller's price list, or, if he had no such price list, the price which he regularly quoted in any other manner, except that in the case of sales of commodities by an establishment selling at retail, the offering price shall be the price at which the commodity was offered for sale at the immediate point of sale (for example, the shelves or counters). But "offering price" shall not include a price intended to withhold a commodity or service from the market, or a price offered as a bargaining price by a seller who usually sells at a price lower than his asking price.

(*i*) *Person.* "Person" includes an individual, corporation, partnership, association, any other organized group of persons, legal successor or representative of any of the foregoing, and includes the United States, any agency thereof, any other government, or any of its political subdivisions, and any agency of any of the foregoing.

(*j*) *Price Regulation.* "Price regulation" means a price schedule effective in accordance with the pro-

[19] Words "or service(s)" added by Amdt. No. 7, 6-19-42, 7 FR 4659.

visions of Section 206 of the Emergency Price Control Act of 1942, a maximum price regulation or temporary maximum price regulation issued by the Office of Price Administration, or any order issued pursuant to any such regulation or schedule.

(*k*) *Purchaser of the Same Class.* "Purchaser of the same class" refers to the practice adopted by the seller in setting different prices for commodities or services for sales to different purchasers or kinds of purchasers (for example, manufacturer, wholesaler, jobber, retailer, government agency, public institution, individual consumer) or for purchasers located in different areas or for different quantities or grades or under different conditions of sale.

(*l*) *Raw and Unprocessed Agricultural Commodity or Greenhouse Commodity.* Commodities that are picked, harvested, threshed, ginned, husked, cleaned, dried, baled, boxed, packed, transported, and/or refrigerated, without more, remain "raw and unprocessed." But operations such as slaughtering, freezing, canning, preserving, milling, crushing, straining, centrifuging, shelling of nuts, cooking, distilling, and purifying with heat, constitute processing for this purpose. For the purposes of this General Maximum Price Regulation, flowers, seeds and bulbs shall be deemed raw and unprocessed agricultural commodities as long as they maintain their original identity without being further processed into products commonly designated by other names.[20] Forest products, such as lumber and wood,[21] naval stores and mineral products, whether processed or unprocessed, shall not be deemed to be agricultural commodities.

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[20] Amended by Amdt. No. 4 issued and effective 6–5–42. 7 FR 4339.

[21] Word "wood" added by Amdt. No. 5, 6–12–42. 7 FR 4487.

(m) *Records.* "Records" includes books of account, sales lists, sales slips, orders, vouchers, contracts, receipts, invoices, bills of lading, and other papers and documents.

(n) *Replacement Cost.* "Replacement cost" shall be the net price paid by the seller after May 18, 1942, or the net price which the seller would have to pay to replace such commodity after such date.

(o) *Sale at Retail.* "Sale at retail" or "selling at retail" means a sale or selling to an ultimate consumer other than an industrial or commercial user, except that (1) for the purpose of § 1499.3 of this General Maximum Price Regulation a "sale at retail" shall not include any sale by a producer, manufacturer, or fabricator of any commodity produced, manufactured, or fabricated by him, and (2) for the purpose of §§ 1499.11 and 1499.13 of this General Maximum Price Regulation a "sale at retail" shall not include any sale to the United States, any other government or any of its political subdivisions, any religious, educational or charitable institution, any institution for the sick, deaf, blind, disabled, aged or insane, or any school, hospital, library or any agency of any of the foregoing.[22]

(p) *Sale at Wholesale.* "Sale at wholesale" means a sale by a person who buys a commodity and resells it, without substantially changing its form, to any person other than the ultimate consumer, except that (1)[23] for the purposes of § 1499.3 of this General Maximum Price Regulation a sale at wholesale shall include any sale by such person to an industrial or commercial user,[23] and (2) for the purposes of § 1499.9 (a)*(3), "sold at wholesale" refers to a sale of fluid milk or

[22] Amended by Amdt. No. 7, 6–19–42, 7 FR 4659.

[23] Exception (1) added by Amdt. No. 7, 6–19–42, 7 FR 4659. Exceptions (2) and (3) added by Amdt. No. 21, 8–1–42, 7 FR 6007.

cream in bottles or paper containers to any person, including an industrial or commercial user, other than the ultimate consumer.

(*q*) *Securities.* "Securities" includes any note, stock, bond, and interest or instrument commonly known as a "security."

(*r*) *Sell.* "Sell" includes sell, supply, dispose, barter, exchange, lease, transfer, and deliver, and contracts and offers to do any of the foregoing. The terms "sale," "selling," "sold," "seller," "buy," "purchase" and "purchaser," shall be construed accordingly. Nothing in this Regulation shall be construed to prohibit the making of a contract to sell a commodity or service at a price not to exceed the maximum price at the time of delivery or supply.

(*s*) *Seller.* "Seller" includes a seller of any commodity or service. Where a seller makes sales or supplies services through more than one selling unit, other than salesmen making sales at uniform prices, each separate place of business of the seller shall be deemed to be a separate seller, except that for the purposes of section 16 of this Regulation, the owner of the business shall be considered the seller regardless of the number of separate places of business he owns.

(*t*) *Service.* "Service" includes any service rendered or supplied, otherwise than as an employee, in connection with the processing, distribution, storage, installation, repair, or negotiation of purchase or sale of a commodity, and generally, without limiting the foregoing, all services which preserve or add to the value or utility of a commodity.

(*u*) *Supplied.* A service shall be deemed to have been "supplied" during March 1942, if during such month it was completed or in process.

(*v*) *Flour.* "Flour" means the flour produced from wheat, rye, buckwheat, rice, corn, oats, barley, soy

beans and potatoes. Combinations of flours produced from the said commodities, and bleached, bromated, enriched, phosphated and self rising flours shall be considered flour. Products of wheat, except for whole wheat flour and whole durum flour, whose ash is more than 1/20 of the protein calculated to a moisture free basis plus .35 per cent or, in the case of products of durum wheat, more than 1.5 per cent calculated to a moisture free basis, shall not be considered flour. In determining whether the ash content of bleached, bromated, enriched, phosphated and self rising flours complies with the above ash requirements, allowance shall be made for the increase in the ash content resulting from the addition of the bleaching, bromating, enriching, phosphating and self rising ingredients.[24]

(*w*) *Cake Mixes and Flour Mixes.* "Cake mixes" and "Flour mixes" means combinations of flour or flours with any other ingredients except those used in making bleached, bromated, enriched, phosphated and self rising flours.[25]

(*x*) *Packaged as Applied to Cake Mixes and Flour Mixes.* "Packaged" as applied to "cake mixes" and "flour mixes" means packaged for sale at retail in a container of any sort holding three pounds or less, where the packaging has been done before arrival at the point of retail sale.[26]

(*y*) *Ores.* "Ores"[26a] means any mineral substance in a crude state used chiefly as a commercial source of metal contained therein. "Ore concentrates" means

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[24] Added by Amdt. No. 2, 5–27–42, 7 FR 3990; amended by Amdt. No. 6, 6–19–42, 7 FR 4659.

[25] Added by Amdt. No. 2, 5–27–42, 7 FR 3990; amended by Amdt. No. 6, 6–19–42, 7 FR 4659.

[26] Added by Amdt. No. 2, 5–27–42, 7 FR 3990.

[26a] Added by Amdt. No. 17, 7–25–42, 7 FR 5784.

any ore, as defined above, after the removal of a part of the gangue, or a part of the non-metallic elements, either by a physical or chemical process.

(z) *Precious Stones.* "Precious stones" means any ruby, sapphire, emerald, natural pearl, or any diamond (other than an industrial diamond) weighing more than 1.00 carat, or any semi-precious stone after sale by the cutter, when the cutter has received more than $100 for the sale of the stone. Synthetic stones and cultured pearls shall not be deemed "precious stones." If two or more diamonds (other than industrial diamonds) with an aggregate weight of 1.50 carats are set in one mounting, the diamonds shall be deemed precious.[27]

Other price regulations, applicability, effective date

§ 21 [§ 1499.21] *Effect of other price regulations.* Sections 1499.13, 1499.14, 1499.15, 1499.16 and 1499.25 of this General Maximum Price Regulation shall apply but the other provisions of this General Maximum Price Regulation shall not apply to any sale or delivery for which a maximum price is in effect, at the time of such sale or delivery, under the provisions of any other price regulation issued, or which may be issued, by the Office of Price Administration, unless otherwise provided in any such price regulation.[28]

§ 22 [§ 1499.22] *Applicability.* The provisions of this Regulation shall be applicable to the United States, its territories and possessions, and the District of Columbia.

§ 23 [§ 1499.23] *Effective date.* All the provisions of this Regulation shall become effective on May 11, 1942, except that:

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[27] Added by Amdt. No. 9, 6-30-42, 7 FR 5027; exception for industrial diamonds added by Amdt. No. 13, 7-14-42, 7 FR 5445.

[28] Amended by Amdt. No. 7, 6-19-42, 7 FR 4659.

(a) The provisions of this Regulation, other than sec. 11(a), shall not apply to establishments selling at retail until May 18, 1942;

(b) The provisions of secs. 1 and 2 shall not apply to any sale of services at retail until July 1, 1942; and

(c) The provisions of sec. 11(a) shall become effective upon the date of issuance of this Regulation.

§ 23a [§ 1499.23a] *Effective date of amendments.* (a) This Amendment No. 1 (§§ 1499.13 (b) and 1499.23a) to the General Maximum Price Regulation shall become effective May 18, 1942.

(b) This Amendment No. 2 (§§ 1499.9 (a) (4), 1499.20 (v) (w) and (x)) to this General Maximum Price Regulation shall become effective May 29, 1942.

(c) This Amendment No. 3 (§ 1499.9 (a) (7)) to this General Maximum Price Regulation shall become effective May 29, 1942.

(d) Amendment No. 4 (§§ 1499.9 (a) (1), 1499.20 (l) and 1499.25) to General Maximum Price Regulation shall become effective June 5, 1942.

(e) Amendment No. 5 (§ 1499.9 (a) (14) and paragraph (l) of § 1499.20) to General Maximum Price Regulation shall become effective June 19, 1942.

(f) Amendment No. 6 (§ 1499.20 (v) and (w)) to the General Maximum Price Regulation shall become effective June 22, 1942.

(g) Amendment No. 7 (§§ 1499.1 (c), 1499.7, 1499.15, 1499.16, 1499.20 (f), (g), (o), and (p), and 1499.21) to General Maximum Price Regulation shall become effective June 25, 1942.

(h) Amendment No. 8 (§§ 1499.10 and 1499.20 (c)) to General Maximum Price Regulation shall become effective July 1, 1942.

(i) Amendment No. 9 (§§ 1499.9 (a) (12), 1499.20 (z)) to this General Maximum Price Regulation shall become effective July 2, 1942.

(j) Amendment No. 10 (§ 1499.18) to General Maximum Price Regulation shall become effective July 14, 1942.

(k) Amendment No. 11 (§ 1499.13 (b)) shall become effective July 11, 1942.

(l) Amendment No. 12 (§ 1499.4a) to General Maximum Price Regulation shall become effective July 15, 1942.

(m) Amendment No. 13 (§ 1499.20 (z)) to this General Maximum Price Regulation shall become effective July 16, 1942.

(n) Amendment No. 14 (§ 1499.4b) to General Maximum Price Regulation shall become effective July 21, 1942.

(o) Amendment No. 15 (§ 1499.2 "Special Provisions") to General Maximum Price Regulation shall become effective July 15, 1942.

(p) Amendment No. 16 (§ 1499.9 (a)(7)) to this General Maximum Price Regulation shall become effective July 29, 1942.

(q) Amendment No. 17 (§ 1499.20 (y)) to this General Maximum Price Regulation shall become effective July 30, 1942.

(r) Amendment No. 18 (§ 1499.13 (a)) to General Maximum Price Regulation shall become effective July 30, 1942.

(s) Amendment No. 19 (§ 1499.24) to the General Maximum Price Regulation shall become effective August 6, 1942.

(t) Amendment No. 20 (§ 1499.16) to the General Maximum Price Regulation shall become effective August 8, 1942.

(u) [28a] Amendment No. 21 (§§ 1499.9 (a) (3) and 1499.20 (p)) to this General Maximum Price Regula-

[28a] Amended by Amdt. No. 22, 8-7-42, 7 FR 6216.

tion shall become effective August 7, 1942, except that the effective date of this amendment with respect to both fluid milk sold at wholesale and cream sold at wholesale in the Washington market area as defined in Federal Milk Marketing Order No. 45, as amended, issued by the Secretary of Agriculture August 29, 1941, shall be October 2, 1942.

(v). Amendment No. 22 to this General Maximum Price Regulation shall become effective August 7, 1942.

§ 24 [§ 1499.24] *Appendix A: General Maximum Price Regulation—Report of maximum price determined under § 1499.3 (a)—Form GMPR:2* [*Omitted.*]

§ 25 [§ 1499.25] *Appendix B: Commodities designated by the Price Administrator as Cost-of-Living Commodities* [*Omitted.*]

Issued this 28th day of April, 1942.

(Sgd.) LEON HENDERSON,
Leon Henderson,
Administrator.

STATEMENT OF CONSIDERATIONS INVOLVED IN THE ISSUANCE OF THE GENERAL MAXIMUM PRICE REGULATION

General price increases have become a grave threat to the efficient production of war materials and to the stability of the national economy. It is now necessary to meet this threat decisively. Accordingly, the Office of Price Administration is issuing a General Maximum Price Regulation as the cornerstone for a comprehensive program to eliminate the danger of inflation.

All prices of all commodities and services are now subject to great inflationary pressure. Within the limits of present statutory authorization, this Regulation establishes maximum selling prices for all commodities and services for which maximum prices have not hitherto been fixed. By so doing, it brings all sellers and all buyers within the compass of wartime economic mobilization. It combats the danger of inflationary price advances at all places where that danger exists.

It is the immediate purpose of this Regulation to guarantee to the American people that their living costs will remain stable. This is a prerequisite to the further measures which are necessary to insure wartime stability in the economy. Stable living costs mean stability in the real wages of the worker. With price stability, wage stabilization, an important step toward stabilization of the aggregate volume of purchasing power, becomes a practical goal of public policy. Every producer whose prices are stabilized is assured that his costs, which are based upon the

stabilized prices of others, will not rise. Stability in the price level means that participants in war-savings programs are assured that the real value of their savings will be maintained. Likewise, the taxpayer knows that his remaining untaxed income will have an assured purchasing power. All of these measures become possible when prices are stabilized. All of them are necessary in order that price stabilization may work.

This Regulation does not insure that the standard of living of any individual or group or of the Nation as a whole will remain unimpaired. The loss of overseas supplies and the conversion of domestic manpower and facilities to war production make this impossible. The material standard of living of the American people will fall. But this Regulation does help to protect the Nation against inflationary maladjustments as between different people and classes of people. And it does help insure that scarce goods will be allotted on a basis of equality. In the absence of this Regulation many scarce items would come into the possession of those best able to pay high prices. This Regulation is an indispensable prerequisite to the allocation of scarce but essential goods to the members of the community on the basis of need rather than on the basis of ability to pay.

But in its larger context this Regulation is necessitated by the danger of inflation. The full implications of this danger for war production and domestic stability are worthy of a complete and careful statement.

The Inflation Crisis

A gap has appeared between the supply of goods and services which is available and the purchasing power or demand of the people who wish to buy these goods

and services. This gap is widening. Both military and civilian demand have increased vastly in recent months. War expenditures, which totaled $1,000,000,000 in March 1941 and $2,000,000,000 in December 1941, rose to nearly $3,000,000,000 in March 1942. In December 1942, on the basis of present authorizations, these expenditures will exceed $6,000,000,000.

Civilian demand has its source in income payments to individuals by the Government and by industry. The rate of monthly increase in these payments has advanced from one-half of 1 percent in the months immediately following the outbreak of the war in September 1939, to 1 percent, to 1½ percent, and since March 1941 to 2 percent. There is evidence of a further acceleration in this rate of increase in the future.

The supply of civilian goods and services available for purchase from this income is diminishing. Manpower, materials, and machinery are being devoted to the production of planes, ships, tanks, and guns instead of to the production of civilian goods and services. The supply of such civilian goods and services will be progressively reduced by approximately 1 percent per month for the balance of this year.

During 1941, it is estimated, individual income totaled $92,000,000,000. Of this amount $18,000,000,000 was accounted for by personal taxes and individual savings, and $74,000,000,000 was spent on consumers' goods and services.

During 1942, at the present rate of increase of income payments, individual income will total $117,000,000,000. Of this amount, it is estimated $31,000,000,000 will be saved or paid to the Government in personal taxes and $86,000,000,000 will be spent.

The supply of goods and services available for civilian use totaled $74,000,000,000 in 1941. During 1942, the supply will total $65,000,000,000, computed

on the basis of 1941 prices. Making allowance for the increase in prices which took place prior to April 1, 1942, the supply will total $69,000,000,000.

Thus, demand in 1942, unless limited, will exceed supply by $17,000,000,000.

The Effect of the Inflationary Gap on Prices

The gap between the total purchasing power available for disposal by the people of the United States and the total supply of goods and services available for them to purchase has caused, in recent months, a a general advance in prices and an advance which is accelerating in rate. It has made the advance common to services and to all classes of goods, whether farm products or industrial commodities, raw materials or merchandise in wholesalers' or retailers' stocks.

The increasing momentum of this over-all price advance is shown by the following comparisons: since the outbreak of the war in September 1939 the prices of basic raw materials have risen by 66 percent. One-half of this increase has occurred during the past 12 months. Wholesale prices since September 1939 have increased by 31 percent. Two-thirds of this increase has occurred during the past 12 months. Retail prices of foods, clothing and house furnishings have risen, since September 1939, by 25 percent. More than three-fourths of this increase has taken place during the past 12 months.

The $17,000,000,000 by which projected demand will exceed the supply of goods available during 1942, if left to itself, would force an estimated increase of 25 percent in the cost of living this year. But price increases build on each other. Increases in the cost of living lead to wage adjustments. These in turn

augment purchasing power at the same time that they increase industrial costs. Therefore, by the time prices had risen the 25 percent necessary to raise the value of the available supply of goods up to the total dollar demand now forecast, the total demand would itself have increased. Left to itself, the process has no definite end. It can be stopped only by measures which will eliminate the occasion for increased income payments on one hand, and narrow the gap by withdrawing excess purchasing power on the other. The alternative is inflation.

The Consequences of Inflation

The consequences of inflation are the consequences of the stage which it is permitted to reach. We have already passed through a mild stage of inflationary price advance. We are entering, as the foregoing analysis shows, a more severe and intensive stage—a stage where the upward movement of prices will increase both in magnitude and in tempo. Beyond that stage lies the fatal spiral which engulfed the countries of central Europe following the first World War.

The first stage, that which we have already experienced, is itself a warning of what is to come. Many of our people with smaller incomes have already seen the necessaries of life pass beyond the reach of their slender means. They have already experienced the sense of hopelessness and frustration which comes with the change from subsistence to a deeper poverty. They have already brought their children to a table from which accustomed and necessary foods have been removed by rising prices.

Suspicion of undue advantage and profiteering has already been engendered between farmer and worker, and worker and employer. True unity of purpose

must rest on the conviction that reward and sacrifice are received and rendered in common. The irregular, uncertain, and manipulative advances in prices which characterize all stages of inflation have already damaged that conviction.

In a narrower sense, inflation has already multiplied the cost of the war. The price rises which have occurred since September 1939 will increase by 35 billions of dollars the money cost of the war program now authorized. The total cost of the first World War, by comparison, was 31 billions, and that 31 billions, it is estimated, included 13½ billions of inflated prices.

These things have already happened. They are behind us. The next stage of inflation—the one that we now face—will extend this pattern. And it will add to it a new and far more serious configuration. If unchecked, inflation will launch a race between the wages of the stronger bargaining groups and the cost of living. This means constant revision of wage contracts, constant bargaining and negotiation and the certain prospect of interrupted production. The normal collective bargaining processes are strained, perhaps broken. Business commitments are placed on a month-to-month, perhaps on a week-to-week basis. Business planning gives way to make-shift decision. War production is shackled and perhaps disrupted. It may be paralyzed.

In a sense, inflation is a substitute for production. Money is made not by producing commodities, but by withholding them from use. Scarce materials find their way into inventories and hoards, and profit is derived from advancing markets. The speculator rather than the producer becomes the successful businessman. Materials that might yield tanks and guns

for the armed forces, or food and clothing for our people at home, are surreptitiously routed to the warehouse.

Those whose incomes are small and fixed have already suffered. During the stage of inflation now ahead, their position will become desperate. The well-stocked store will become an empty fraud for our old people who live on annuities and pensions, for dependents of our soldiers and sailors, and for the substandard wage groups whose bargaining position is weak. The prices of necessaries will have passed beyond their reach. For during inflation goods are reserved for the person with the longest pocketbook, the person who is able to protect himself during the upward spiral, or the person who has turned the spiral to his selfish advantage.

The pattern of disaster which attends the final stage of inflation is well known. In this stage prices are revised upward weekly and then daily. Incomes enter into a crazy race with prices. Money is something to be passed on as quickly as possible. It is no longer a symbol of stability but a mark of social disintegration. Thrift and saving become incompatible with self-preservation. Savings, investments, life insurance policies, all the results of past thrift, become worthless. Legitimate business disappears; speculation and profiteering remain. Organized government itself is undermined.

The hopelessness and frustration of the early stages of inflation soon turn to anger and despair.

To think of mobilization of resources for war in such an environment is the merest fancy.

Inflation does not always run its full course, although between the present stage and the final collapse there is no definite stopping place. But the principle can be laid down that the greater the period over which the

process extends without complete and effective control, the more serious and the more painful is the task of stopping it, and the more dangerous the disorganization which must follow. The present inflationary movement may, of course, end, not with wild inflation, but with the end of war and war-occasioned spending. Or it might be brought to a halt by measures such as those which are now being taken. In the first case, the clear consequence would be a complete and ruinous deflation. Those who were not destroyed by the inflation would be ruined by the ensuing collapse. And deflation, even more than inflation, has shown itself the cause of social disorganization. It was more than a decade after the first World War before agriculture and much of labor and industry in the United States recovered from the wreckage of the 1921 collapse. More serious still, there were wrecked lives and disbanded families for whom there was no recovery at all.

Inflation might also be checked sometime in the future by measures such as those now being taken. Of this it is necessary to say but one thing. While the present measures are painful, they are far less painful than those that would be required a year hence. It is never easy to check an inflationary movement. But there will never be a time when it will be less painful than now.

The Universal Price Ceiling

Until 6 months ago, the main pressure on the price system was wartime demand or wartime shortage of a relatively small number of commodities. Among those were metals, chemicals, sugar, and lumber. Prices for many of these commodities quickly rose to levels higher than were required to bring out available production. These price rises could be checked, and were checked, by individual ceilings on the wholesale price. For

other commodities, price control was not then desirable. In fact, full use of productive facilities and labor, and the transfer of labor and materials from less essential to more essential employments, was aided by flexibility in the price structure. As the pressure from excess demand and diminishing supply grew during the past 6 months, selective controls were multiplied.

Production in the United States has been increased to such an extent that it cannot hereafter be greatly stimulated by additional price rises. Further reorganization of the economy for war must be accomplished through priorities, allocations, and rationing, rather than through price. The pressure toward higher prices is now not merely on shortage commodities, but on all commodities. The same reason which called for selective controls—the need for avoiding price increases beyond those reasonably required to increase production—now calls for the universal control over all commodities.

This step accords with the experience of other countries as they reached the advanced stages of war mobilization. Such a state of mobilization was reached in Germany in 1936. A universal price ceiling was proclaimed in that year. In the democracies, the point was not reached until after the outbreak of war. Both Canada and Australia have preceded us in adopting the general price ceiling. As they reached the stage which the United States has reached today, they, too, found that general control of prices was necessary.

The Companion Measures to the Universal Price Ceiling

The increased inflationary pressure and this Regulation serve as a setting for companion steps in wage, profits, and fiscal policy. When pressure of prices was principally on shortage commodities, governmental

policies designed to limit the growth of consumer income were exercised with restraint. Demand, was excessive only in relation to certain shortage materials, and deflationary economic measures other than selective price control necessarily affect the entire economy. The removal of the purchasing power which was causing the individual price rise could have been achieved only at the expense of simultaneously reducing purchasing power throughout the economy. This purchasing power was being advantageously used to call forth added production. Therefore, income-restraining policies were not necessary as an adjunct to price control and would have been undesirable.

Today, on the other hand, it is important that the excess of purchasing power be rigidly confined. Even if it were possible for this Regulation to continue side by side with an excess of purchasing power the combination would present grave dangers. These dollars would find an outlet in extravagant purchases of goods not immediately needed by the purchaser; they would lead to the burdensome problems of administration and regulation involved in unnecessarily widespread rationing; they would lead to wasteful use of goods which could not but impair national morale.

But more important than these considerations is the elemental fact that there can be no effective price control while at the same time there is so large an amount of excess purchasing power Price regulations must not only be promulgated; they must be accepted and where necessary enforced. The full pressure of excess purchasing power would insure the disregard of law.

The universal price ceiling serves as the framework for other policies which will diminish the inflationary gap. It makes possible an effective war labor policy,

more stringent income and excess-profits taxes, and greatly enhanced savings.

Just as the universal ceiling can operate only when accompanied by these economic policies, so these policies can succeed only when accompanied by the universal ceiling. These economic controls other than price control can operate only generally throughout the economy. They do not check specific price rises in commodities which, because of shortages and other reasons, are subject to unusual pressures. For this purpose a price ceiling is necessary.

The universal ceiling is a necessary adjunct of these companion policies for a further reason. It takes time for such policies to be developed and put into execution, and still more time for their impact to be felt. During this time prices would become further inflated. Unless the inflationary spiral is checked, no economic measures can close the resulting gap. On the other hand, by a prompt over-all ceiling, labor will be relieved from the pressure to demand higher wages in order to keep up with the increased living costs. Those whose dollar income is to be curtailed by increased taxation and savings will have a guaranty that their real income will not be further impaired by price increases and that the value of their savings will not disappear. Businessmen whose prices are fixed will have the assurance that their material costs are also stabilized. Such guaranties must be made before these economic steps can successfully be taken.

Both the universal ceiling and these related economic measures are thus essential to overcome inflation. Without the ceiling, the economic measures might prove to be too little and too late. Without the economic measures, the ceiling would in the long run

become administratively unenforceable and socially harmful. Together, they can abruptly and effectively stop the inflationary spiral.

The Regulation and the Standards of the Act

The Emergency Price Control Act of 1942 provides that whenever in the judgment of the Price Administrator the prices of commodities have risen or threaten to rise he may, by regulation, establish such maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of the act. In the present situation the prices of commodities and services generally are rising and threatening further to rise and this regulation prescribing maximum prices for commodities and services conforms to the statutory standards.

The underlying purpose of the act is to check, and so far as possible prevent, inflation. The purposes of the act, as set forth in section 1 (a), include the avoidance of unwarranted price increases, the assurance that defense appropriations are not dissipated by excessive prices, and the protection of persons with relatively limited incomes. Today it is clear not only that this over-all ceiling will effectuate these purposes but in addition that, realistically, it is the only price regulation which will achieve that result. It achieves that result directly and also indirectly by making possible the execution of related wage and fiscal policies having that effect. In face of the present grave crisis this provides the basic justification for the regulation.

1. Breadth of the Regulation.—The imminence of price increases throughout the economy requires price control which is likewise made generally effective. There are inflationary pressures on prices everywhere. And so everywhere that prices exist there must be controls to prevent them from rising any further.

Retail prices cannot be held down if costs to retailers are left free to rise without limit. There must be control of manufacturers' and wholesalers' prices. And at all levels—retailer, wholesaler, and manufacturer—the control of the prices of cost-of-living items must be based upon control of the prices of all the commodities that enter into the costs of those items. The interdependence of prices, when prices are rising generally, prohibits any possibility of piecemeal control.

Even where prices do not affect each other directly, as costs, they affect each other indirectly. To control the price of more essential products and leave the price of less essential products uncontrolled at best involves arbitrary distinctions. More important it prevents labor and materials from being used in more essential uses and increases the cost of ingredients of the essential items. If a price is fixed on an essential item, and nonessentials remain uncontrolled, manufacturers will switch from the essential to the nonessential. The transfer may be easier in some instances than others, but the tendency is plain. A limited Regulation would obstruct the concentration of men and materials in the most important uses. In war, that concentration is of vital importance.

2. *The base period.*—The core of the General Maximum Price Regulation is its requirement that each seller charge no more than the prices which he charged during the base period, March 1–31, 1942. The basic fairness of this approach is that it catches hold of the price structure during a given period and holds it fast until a judgment can be made as to what adjustments, if any, are needed. The Regulation accepts the level and relationships of prices worked out by the buyers and sellers of the commodities at various economic levels. This is fair and reasonable. Certainly

it is a sufficient basis for a price stop which is offered as a general regulation subject to future refinements and allowances for gross inequities.

The base period is the only competent technique which will assure fairness in general without striving for the sort of fairness in particulars which cannot practicably be achieved in the first step. It is significant that Canada has used a similar base-period technique, and has found that it works.

The selection of one base period rather than another is a matter for reasonable administrative determination. In general, the Price Administrator is of the opinion that a period as near in time as possible to the date of issuance of the regulation provides the fewest administrative difficulties and is likely to cause the least disruption. The issuance of this regulation could not be simultaneous with the determination that it should issue. There were technical considerations to be thought through and disposed of. There were meetings and consultation with trade groups. Care had to be exercised and judgments checked lest the regulation by some mishap, or faulty selection of time or conception, jeopardize rather than further the war program. These deliberations were conducted with all possible dispatch but nevertheless they took time. In the meanwhile there was reason to believe that some merchants had been marking up their prices in anticipation of the possibility of a large-scale program. Complaints of an unusually precipitate increase in prices were made on the floor of the Congress. The situation was partially controlled by the fact that some representatives of commerce and industry were consulted with respect to various technical considerations since an early date in April 1942. Finally, the use of a single calendar month presented an advantage for the many persons whose records were so kept that such

a base period would present fewest problems in making arrangements to comply.

The favorable condition of profits generally strongly supports the regulation. Sellers in general earned profits in 1941 which compared very favorably with profits earned in the period 1936–39, inclusive. The 1936–39 period offers a fair criterion for the profitability of corporate operations before the disturbing effects of the war. It includes the 2 relatively prosperous years, 1936 and 1937, 1 poor year, 1938, and 1 fair year, 1939. Taking the 1936–39 average of corporate profits as 100, the following table indicates the percentage of increase of 1941 corporate profits at the various levels:

Corporate profits before taxes, 1936–41

[Index numbers, 1936–39 average = 100]

Year	Profits of all corporations	Profits of consumers goods manufacturing, wholesale and retail trade corporations			
		Manufacturing	Wholesale trade	Retail trade	Total
1936	114	127	117	126	120
1937	115	98	97	103	99
1938	52	55	58	56	56
1939	118	119	128	115	120
1940	159	141	167	165	156
1941	319	244	302	288	274

The act provides that maximum prices shall be fair and equitable and shall reflect, so far as practicable, a due administrative consideration of prices prevailing between October 1 and 15, adjusted for prior and subsequent increases and decreases in costs and profits.

The general fairness and equity of the Regulation has been shown. It is, moreover, based upon the largest adherence to and consideration of the subsidiary standards which is practicable at the present time.

The adjusted October 1 to 15 base period has already been adopted for producers of a large number of groups of commodities. In the case of other commodities, some increase over October 1 prices may be necessitated by cost increases too substantial to be absorbed, in view of profit positions. The Regulation establishes March 1942 prices as the lawful maximum but supplementary regulations, following analysis of individual commodities which cannot practicably be analyzed separately at this time, may establish prices closer to October 1 prices as adjusted.

The prices of wholesalers and retailers may not necessarily be brought back to their October 1–15 level even where manufacturers' maximum prices are based on October 1 prices, for to a degree some distributors refrain under normal circumstances from marking up their prices so as fully to cover current replacement costs.

In view of this factor, in view of the manufacturers' prices permitted to remain above October 1–15, 1941, prices, for the initial purposes of this general regulation, and in view of the general, though not necessarily immediate, tendency of businessmen to raise their prices as costs increase, the General Maximum Price Regulation considers, so far as practicable, the subsidiary standards of the act.

3, Supplementary regulations; the lag. It was obviously not practicable to ascertain costs and profits of the sellers of each particular commodity and service, or the sellers of each particular commodity at each business level. To have done so would have required so much time as to mean the loss of the fight against inflation. But the considerations and data mentioned above and all other data available to the Office of Price Administration support the general fairness and equity

of the regulation. In large-scale affairs of practical importance it is necessary to make a beginning. So long as the broad outlines of the general regulation are fair, particular difficulties may be handled upon subsequent prompt consideration. No other course is possible or practicable. This is particularly true in the domain of price regulation where so much depends upon prediction and a sense of judgment, and where so much must inevitably be a matter of trial and error and adjustment, with expectations tested in actual experience.

This general regulation will be subject to many refinements and particular revisions. Supplementary regulations will be issued. These will seek to cure difficulties of a technical nature. More important, they will change prices and price margins. They will be issued expeditiously. Accordingly, the first supplementary regulations may themselves be of a relatively general approach subject to further readjustments as time and experience point the way.

The Regulation does not at this time make express provision by multiple base periods for the so-called lag in retail prices. Some retailers have asserted that they determine prices for their wares on the basis of the average cost of their inventory rather than on the basis of replacement costs. They further advise that the regulation should be so constructed as to enable them to acquire new stock below replacement costs in order to preserve their existing percentage margins.

But the difficulty is that the lag is by no means of uniform or universal applicability. A substantial percentage of the commodities purchased by retailers have been stabilized, at the manufacturers' and wholesalers' levels, at prices not exceeding prices prevailing in October 1941. Other goods have been subject to con-

trol upon the basis of prices later in 1941. Retail prices in March 1942 may fairly be assumed to have taken account of such 1941 prices.

Further, there are many commodities of a low-priced fast-moving nature, and commodities such as fresh meats, where retailers are virtually on a replacement-cost basis.

Attention should also be called to a number of items in which the retail prices have increased more percentage-wise than have wholesale prices. This is true of many house furnishings and floor coverings.

In appraising the position of the retailer it must be borne in mind that the wholesalers' prices accepted by this Regulation are prices upon *deliveries* made in March, and not upon orders accepted in March for future delivery. This is a measure which in effect establishes price relationships adjusted to a lag, since in general such lag as exists is likely to be greatest where turn-over is slow. Moreover, to the extent that the lag is likely to accompany large inventories, the existence of these inventories, received over a period and averaged by the retailers, will mean that there will be no immediate hardship and that there will be time to work out adjustments.

The protection provided by large inventories is underscored by the following data on inventories made available by the Department of Commerce:

Retail business inventories	*Value (in millions of dollars)*
End of Month:	
February 1940	5,042
February 1941	5,494
February 1942	6,875

Corrected for the rise in prices, the physical inventory for February 1942 was 6.4 percent greater than it was for February 1941 and 14.7 percent greater than it was for February 1940.

To some extent a lag does exist but such lag as exists is uneven, depending upon the relative movement of wholesale and retail prices. No single formula to correct the lag can be found which would not itself provoke injustices. Moreover, other costs of the retailers have not increased as rapidly as wholesalers' prices; indeed, some are relatively low. The situation calls for a carefully planned and properly executed program, which will review the particular situations where the lag in fact exists. This program the Office of Price Administration has already undertaken.

One thing should be clearly understood. Retail prices will not be increased. Any such course of action would set in motion the rising cost of living trends, the prevention of which is the very purpose of this Regulation. Adjustments may be made in manufacturers' and wholesalers' prices. Efforts will be made to foster economies in manufacturing and distribution, as by the standardization and simplification of goods and by the elimination of unnecessary frills. If necessary, other forms of relief will be devised. But the ceiling will not be punctured.

4. *Exceptions.*—Certain commodities and services are excepted from the operation of the general regulation. There are a variety of reasons for these exceptions. One class of commodities is wholly withdrawn from the regulation by the Act itself. Section 302 (*c*) in defining commodity excludes books, magazines, motion pictures, periodicals, newspapers, etc. It also excludes securities; these are excepted for the additional reason that they do not affect the cost of living.

Another group of exceptions from this regulation consists of commodities which are eligible for regulation under the Act but subject to control only at price levels higher than those prevailing in the March base period. Because of the limitations of Section 3 no

maximum price limitations are being placed on butter and eggs, poultry, mutton and lamb, and other commodities. In some instances, although an agricultural commodity is below 110 percent of parity, it has been possible to include the commodity after it has left the hands of the farmer and has reached the processor since the price at that stage, because of the extent of the intervening margins or because of the nature of the market and competitive conditions will not operate to prevent the agricultural commodity from reaching the price required by section 3 (a).

In addition, a number of commodities are excluded for reasons of administrative impracticability, resulting from lack of standardization of units, the frequency and small size and character of the transactions involved, or some other factors. Examples of commodities excepted at all stages for administrative reasons include rare stamps, coins, and books; antique furniture; live animals, and the like. Other exceptions from the Regulation are attributable to the fact that the commodity involved is subject to Regulation at a subsequent stage of production or distribution where effective control may more feasibly be exercised. Such commodities include raw and unprocessed greenhouse or agricultural commodities (some of which would in any event have been excepted in view of section 3); and ores and concentrates.

Reference may also be made to a group of exceptions not yet delineated representing commodities almost exclusively purchased by Government agencies for use in the war effort. The principle of exclusion is intended to further the war effort, and to prevent any possibility of disruption thereof and will be implemented by separate exclusionary regulations and orders supplemental to the general regulation, to be issued as the need may be indicated.

5. Records and Reports; Licensing and Registration.—The Regulation provides for the keeping of records, a statement of base prices to be made available for examination, the marking or posting of the maximum prices of stated cost-of-living commodities, and the licensing and registration of retailers and wholesalers. The content of these provisions is clearly set forth in the regulation itself and needs no further clarification in this statement. These are the minimum provisions necessary to make price control effective and enforceable. While not containing the substance of the general regulation, they are in many respects the most important provisions from a practical point of view.

6. Conclusion.—The rapid, erratic increases in prices we call inflation is no longer a threat; to a painfully substantial degree it is a fact. Today we have no choice left but burdensome price controls on a Nation-wide front, buttressed by complementary economic measures, or a bitter and disastrous defeat in an economic war which would destroy the fruits of the victory which will ultimately be ours. We have chosen to meet the formidable enemy at home with the total economic mobilization of universal price regulation. In this war and the other there will be casualties. Neither mobilization will be easy. Our greatest strength remains the common understanding of all our peoples that only in this way can the future of our democracy be insured.

Issued this 28th day of April 1942.

(Sgd.) LEON HENDERSON,
Leon Henderson,
Administrator.

TITLE 32—NATIONAL DEFENSE

CHAPTER XI—OFFICE OF PRICE ADMINISTRATION

Part 1499—Commodities and Services

GENERAL MAXIMUM PRICE REGULATION

SUPPLEMENTARY REGULATION NO. 11—EXCEPTIONS FOR CERTAIN SERVICES[1]

A statement of considerations involved in the issuance of this Supplementary Regulation, issued simultaneously herewith, has been filed with the Division of the Federal Register. For the reasons set forth in that statement, under the authority vested in the Price Administrator by the Emergency Price Control Act of 1942 and pursuant to section 1499.10 of the General Maximum Price Regulation, Supplementary Regulation No. 11 is hereby issued. Section 1499.26 (c) (2) heretofore a part of Supplementary Regulation No. 1 is hereby incorporated into this Supplementary Regulation No. 11.

1499.46 *Exceptions for Certain Services.* (a) The provisions of General Maximum Price Regulation, other than section 1499.11 (a), shall not apply to the following services until July 1, 1942:

(1) Transportation services of carriers, other than common carriers within the exemption conferred by Section 302 (c) of the Emergency Price Control Act of 1942.

(2) Commercial storage and warehousing and services incident thereto.

(3) Services of stevedoring companies.

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[1] 7 F. R. 4543.

(4) Services of car loading and car unloading companies.

(5) Services of transportation equipment rental companies.

(6) Services of freight forwarders, consolidators, or distributors, not offering such services to the general public as common carriers within the exemption conferred by Section 302 (c) of said Act.

(7) Terminal services.

(8) Services of transportation brokers.

(9) Services of custom brokers.

(10) Services of transportation agents (other than employees of transportation companies).

(11) Packing, crating, marking and labelling of shipments.

(12) Pre-cooling, icing, ventilating, and heating of shipments and of transportation equipment.

(13) Dry cleaning services sold other than to the person owning the commodity upon which the service is rendered, by any dry cleaning establishment.

(b) Definitions.

(1) Unless the context otherwise requires, the definitions set forth in section 1499.20 of the General Maximum Price Regulation shall apply to the terms used herein.

(c) Supplementary Regulation No. 11 (1499.46) shall become effective June 17, 1942.

(Pub. Law 421, 77th Cong.)

Issued this 16th day of June, 1942.

(Sgd.) LEON HENDERSON,
Leon Henderson,
Administrator.

STATEMENT OF CONSIDERATIONS INVOLVED IN THE ISSUANCE OF SUPPLEMENTARY REGULATION NO. 11 TO THE GENERAL MAXIMUM PRICE REGULATION

Supplementary Regulation No. 11 postpones until July 1, 1942, the effective date of the General Maximum Price Regulation with respect to transportation services and various other services allied to transportation. Maximum prices with respect to part of the above services became effective on May 11, 1942; the General Maximum Price Regulation, however, postponed the effective date of maximum prices for services at retail until July 1, 1942. As originally issued, the General Maximum Price Regulation was inapplicable to the services of a common carrier or other public utility. The services, effective date of the General Maximum Price Regulation to which is postponed by Supplementary Regulation No. 11, include those of carriers other than common carriers, those of persons engaged in furnishing commercial storage and warehousing, stevedoring companies, carloading and car unloading companies, freight forwarders, consolidators and distributors who do not hold themselves out to serve the general public as common carriers, terminals, transportation brokers and customs brokers. After July 1, 1942, the maximum rates and charges for such services may not exceed the applicable maximum price or charge permitted by the General Maximum Price Regulation. The postponement of effective dates with respect to those services is occasioned by the vital need of avoiding any possible interruption in the flow of commodities. Accordingly, persons furnishing such transportation and allied services are given further time in which to conform their establishments to the requirements of the General Maximum Price Regulation.

So that all services excepted from the General Maximum Price Regulation either for a limited time or without limitation in time may, for convenience of reference, be incorporated in one supplementary regulation, the provisions for postponement until July 1, 1942 of the effective date for dry-cleaning services heretofore contained in section 1499.26 (c) (2) of Supplementary Regulation No. 1 has been incorporated into this Supplementary Regulation No. 11.

Issued this 16th day of June, 1942.

(Sgd.) LEON HENDERSON,
Leon Henderson,
Administrator.

TITLE 32—NATIONAL DEFENSE

CHAPTER XI—OFFICE OF PRICE ADMINISTRATION

Part 1499—Commodities and Services

GENERAL MAXIMUM PRICE REGULATION

AMENDMENT NO. 1 TO SUPPLEMENTARY REGULATION NO. 11—EXCEPTIONS FOR CERTAIN SERVICES[1]

A statement of the considerations involved in the issuance of this Amendment, issued simultaneously herewith, has been filed with the Division of the Federal Register. In section 1499.46 paragraphs (b) and (c) are redesignated paragraphs (c) and (d) (1) respectively and a new paragraph (b) is added as set forth below.

1499.46 *Exceptions for Certain Services:*

* * * * *

(b) General Maximum Price Regulation shall not apply to the rates, fees, charges or compensation for the following services:

(1) Accountants and auditors, fees and charges of

(2) Actuaries, fees and charges of

(3) Advertising agencies, rates charged by

(4) Advertising facilities (outdoor), rates charged for use of

(5) Agents: Artists', authors', playwrights', actors', fees and charges of

(6) Adjustment agencies, fees and charges of

[1] 7 F. R. 4738.

(7) Arbitration and Conciliation services, fees and charges for

(8) Architects, fees and charges of

(9) Authors, fees and compensation of

(10) Bookkeeping services, compensation for.

(11) Booking agents (theatrical, etc.), fees and charges of

(12) Check-cashing services, fees and charges for

(13) Chemists (consulting), fees and compensation of

(14) Claim adjusting, charges for

(15) Collection bureaus and agencies, fees and rates of

(16) Correspondents, fees and compensation of

(17) Court reporting (except when a transcript is furnished), fees and charges for

(18) Credit information services, rates and charges for

(19) Detective agencies, fees and charges of

(20) Efficiency experts, fees and charges of

(21) Electricity (companies furnishing, as public utilities), rates charged by

(22) Employment agencies, rates charged by

(23) Engineers, consulting (civil, electrical, mechanical, marine, etc.) other than engineering firms engaged in the sale of equipment or in contract construction, fees and charges of

(24) Entertainers, fees and compensation of

(25) Express companies and freight forwarders offering their services to the general public as common carriers, rates charged by

(26) Electrical logging of oil-well holes, charges for

(27) Financial services, fees and charges for

(28) Farm-management services, fees and charges for

(29) Fire-reporting services, fees and charges for

(30) Gas (companies supplying, as public utilities through mains), rates charged by

(31) Grain warehousing services performed for the United States or any agency thereof.

(32) Hunting, fishing, and trapping on preserves, rates charged for

(33) Incorporation services, fees and charges for

(34) Insurance, rates charged by any person selling or underwriting

(35) Investment counselling, fees and charges for

(36) Lawyers, fees and charges of

(37) Lecturers, fees and compensation of

(38) Light, heat, or power (companies furnishing, as public utilities), rates charged by

(39) Mannequin and modelling services, fees and compensation for

(40) Marketing forecasting, fees and charges for

(41) Merchandising counsel, fees and charges of

(42) Motion pictures or other theater enterprise, rates charged by

(43) News syndicates, rates charged by

(44) Newspapers, periodicals and magazines, rates charged by

(45) Notary publics, fees and charges of

(46) Personnel Management services, fees and charges for

(47) Press association and feature services, rates charged by

(48) Process servers, fees and charges of

(49) Public-relation and publicity counsels, fees and charges of

(50) Radio and television stations, rates charged by

(51) Rates and charges by persons engaged in the business of publishing, printing, typesetting, plate-making and binding and rendering related services in

connection with books, magazines, newspapers and periodicals.

(52) Research services (Food, investment, laboratory, statistical, marketing, etc.), fees and charges for

(53) Seismographic exploration, rates charged for

(54) Services rendered in connection with title guaranty, title search, abstracting and surveying, fees and charges for

(55) Services the rates for which are regulated by the Department of Agriculture under the Stockyards and Packers Act.

(56) Shot-hole drilling, fees and charges for

(57) Speakers' bureaus, fees and charges of

(58) Systematizing services, fees and charges for

(59) Tax consultants, fees and charges of

(60) Telephone service, secretarial, rates charged for

(61) Telephone services, rates charged for

(62) Telegraph service, rates charged for

(63) Ticker services, fees and charges for

(64) Ticket services and agencies for theater, or passenger transportation, fees and charges for

(65) Tourist agencies and travel bureaus, fees and charges of

(66) Traffic consultants, fees and charges of

(67) Translation services, fees and charges for

(68) Transportation of commodities by persons offering their services to the general public as common carriers by rail, water, motor, pipe line, or other means of conveyances, rates charged for; Provided, however, that charges for storage and warehousing and all other services incident thereto by any person shall not be excluded from the General Maximum Price Regulation.

(69) Transportation of persons, rates charged for

(70) Tree surgery, fees and charges for

(71) Veterinarians, fees and charges of

(72) Watchman services, fees and charges for

(73) Water (companies supplying, to urban areas as public utilities), rates charged by

(74) Window display service, fees and charges for

* * * * *

(d) * * *

(2) Amendment No. 1 (1499.46 (b)) to Supplementary Regulation No. 11 shall become effective July 1, 1942.

(Pub. Law 421, 77th Cong.)

Issued this 23rd day of June 1942.

(Sgd.) LEON HENDERSON,
Leon Henderson,
Administrator.

STATEMENT OF CONSIDERATIONS INVOLVED IN THE ISSUANCE OF AMENDMENT NO. 1 TO SUPPLEMENTARY REGULATION NO. 11 TO THE GENERAL MAXIMUM PRICE REGULATION

By Amendment No. 8 to the General Maximum Price Regulation, issued simultaneously herewith, section 10 is rewritten. It no longer specifically exempts any services but merely provides that services excepted from the General Maximum Price Regulation are to be specified in supplementary regulations or amendments thereto. To clear up any misunderstanding concerning the services that are excepted, the Amendment contemplates the issuance of specific lists of services excepted from the General Maximum Price Regulation.

This Amendment to Supplementary Regulation No. 11 substitutes a detailed list of services excepted in lieu of the categories of services formerly excepted by section 10 of the General Maximum Price Regulations prior to the amendment thereof. Common carriers and public utilities excepted are specifically named. The questions that have arisen concerning what financial services are covered are resolved. Some financial services are rendered in connection with a commodity others are not. Between, there is a fringe of doubtful cases. For administrative reasons, most financial services have been excepted from the General Maximum Price Regulation. There is no longer a specific exception for services relating solely to real property. This exception formerly contained in section 10 of the General Maximum Price Regulation gave rise to some confusion. Many services, although they may relate to real property, are also rendered "in connection with the processing, distribution, storage, installation, repair,

or negotiation of purchase or sale of a commodity," or, "preserve or add to the value or utility of a commodity" and thus fall within the definition of the term "service" in the General Maximum Price Regulation. Such services are covered by the General Maximum Price Regulation unless specifically excepted. Thus, construction services, for example, are covered by the General Maximum Price Regulation. Fees and charges for services rendered in connection with title guaranties, title searches, abstracting, and surveying are specifically excepted by this Amendment to Supplementary Regulation No. 11.

This Amendment also excepts grain warehousing services performed for the United States or any agency thereof and stockyard services subject to the Stockyards and Packers Act. Charges for these services are now subject to supervision by other federal agencies and at present no specific price action with respect to such services is deemed necessary.

There are a number of services not covered by the General Maximum Price Regulation which are not listed in this Amendment. This is because such services are clearly excluded from the General Maximum Price Regulation by the definition of the term "service," since they are not rendered in connection with a commodity. Such services include those rendered by ambulances, athletic and health clubs, barber shops, bath and masseur establishments, beauty parlors and beauticians, chiropractors, dentists, hospitals, medical clinics, midwives, nurses, osteopaths, physicians and surgeons, recreation clubs and camps, reducing salons, and sanatoria.

Issued this 23rd day of June 1942.

(Sgd.) LEON HENDERSON,
Leon Henderson,
Administrator.

CERTIFICATION OF TRANSCRIPT OF PROCEEDINGS BEFORE THE PRICE ADMINISTRATOR

The undersigned, Leon Henderson, does hereby certify that, pursuant to the Emergency Price Control Act of 1942 (P. L. 421, 77th Cong., 2d Sess.), he is the duly appointed, qualified, and acting Price Administrator of the Office of Price Administration and that the within and foregoing Transcript of Proceedings is a true and correct transcript of such portions of the proceedings before the Price Administrator in connection with the protest of Davies Warehouse Company, a corporation, Docket No. GF1–428–P, as are material under the complaint.

Dated at Washington, D. C., this 4th day of September, 1942.

(Sgd.) LEON HENDERSON,
Leon Henderson,
Administrator.

(94)

U. S. GOVERNMENT PRINTING OFFICE: 1942

UNITED STATES EMERGENCY COURT OF APPEALS

No. 5

DAVIES WAREHOUSE COMPANY, a Corporation, COMPLAINANT

v.

PRENTISS M. BROWN, PRICE ADMINISTRATOR, RESPONDENT

Heard January 25, 1943 Decided May 28, 1943

Mr. Reginald L. Vaughan, for complainant.

Mr. W. R. Ming, Jr., Attorney, with whom *Messrs. David Ginsburg*, General Counsel, *Thomas I. Emerson*, Associate General Counsel, *Nathaniel L. Nathanson*, Assistant General Counsel, *Ben W. Heineman*, Chief, Court Review Branch, *Carl H. Fulda* and *H. H. Schneider*, Attorneys, all of the Office of Price Administration, were on the brief, for respondent.

Before VINSON, Chief Judge, and MARIS and MAGRUDER, Judges.

MARIS, Judge: Complainant conducts the business of a public warehouse in the City of Los Angeles, California. Its business is declared by both constitution[1] and statute[2] of California to be that of a public utility subject to regulation by the railroad commission of the state. That regulation includes the fixing of rates and charges of the complainant. Pursuant to the California statute the railroad commission on May 12, 1942 authorized complainant to make an increase in its existing rates, effective May 22, 1942.

On April 28, 1942 the Price Administrator acting under the authority conferred upon him by the Emergency Price Control Act of 1942 issued a General Maximum Price Regulation[3] which fixed as seller's maximum prices for any commodity or service the highest price charged by him during the month of March, 1942. Section 10 of the regulation, as amended,[4] provided that it should not apply to such services as might be specified by supplementary regulations or amendments thereto.

Section 302(e)(2) of the Emergency Price Control Act of 1942 (50 U. S. C. A. App. § 942(e)(2) provides:

> "(e) The term 'commodity' . . . includes services rendered . . . in connection with the . . . storage . . . of a commodity, or in connection with the operation of any service establishment for the servicing of a commodity: *Provided*, That nothing in this Act shall be construed to authorize the regulation of . . . (2) rates charged by any common carrier or other public utility . . ."

[1] Constitution of California, Art. IV, § 33, Art. XII, § 23.

[2] Public Utilities Act of California, §§ 2(aa), 2(dd), 2½, 14, 15, 63a.

[3] 7 F. R. 3153.

[4] 7 F. R. 4738.

On June 18, 1942 the Price Administrator issued Supplementary Regulation No. 11[5] by which it was declared that the General Maximum Price Regulation would not apply to certain services until July 1, 1942. Among the services thus treated were "(2) Commercial Storage and warehousing and services incident thereto." On June 25, 1942 the Price Administrator issued Amendment No. 1[6] to Supplementary Regulation No. 11 providing for the exception of certain services from the operation of the General Maximum Price Regulation, effective July 1, 1942. Of the services thus excepted the only ones partaking of the nature of a common carrier or other public utility were the following:

"(21) Electricity (companies furnishing as public utilities), rates charged by

. . .

(25) Express companies and freight forwarders offering their services to the general public as common carriers, rates charged by

. . .

(30) Gas (companies supplying, as public utilities through mains), rates charged by

. . .

(38) Light, heat, or power (companies furnishing, as public utilities), rates charged by

. . .

(61) Telephone services, rates charged for
(62) Telegraph service, rates charged for

. . .

(68) Transportation of commodities by persons offering their services to the general public as common carriers by rail, water, motor, pipe line, or other means of conveyances, rates charged for: *Provided*, however, that charges for storage and warehousing and all other services incident thereto by any person shall not be excluded from the General Maximum Price Regulation.
(69) Transportation of persons, rates charged for

. . .

(73) Water (companies supplying, to urban areas as public utilities), rates charged by."

The effect of the General Maximum Price Regulation, the Supplementary Regulation and the amendment, as applied to the complainant, was to prohibit it after July 1, 1942 from taking advantage of the rate increase which had been allowed to it by the California Railroad Commission two months previously. Asserting itself to be a public utility within the meaning of the exemption of "any common carrier or other public utility" set forth in Section 302(c)(2) of the act and therefore aggrieved by the failure of the Price Administrator to exempt its business from the General Maximum Price Regulation, the complainant filed a timely protest with the Price Administrator. The Price Administrator denied the protest and the complainant filed the present complaint asking this court to set aside the General Maximum Price Regulation, Supplementary Regulation No. 11 and Amend-

[5] 7 F. R. 4543.
[6] 7 F. R. 4738.

ment No. 1 thereto insofar as they purport to regulate the charges of the complainant.

It is the contention of the complainant that the words "any common carrier or other public utility" as used in the exemption clause of section 302(c)(2) of the act mean any common carrier or other public utility which is designated as such by existing law and regulated as to its rates by existing federal, state or municipal authority. The Price Administrator contends, on the other hand, that the interpretation of these words is not dependent on state law but that they must be given a uniform effect throughout the United States and must therefore be deemed to refer to all common carriers and other public utilities generally and traditionally recognized as such without regard to whether in a particular state they are or are not subject to rate regulation by statutory authority. It is the Price Administrator's further contention that the business of a public warehouseman is not a public utility in this sense, even though in California it is by statute described and regulated as such. Consequently, he says, the complainant is not entitled to exemption from his price regulation as a public utility and its complaint should be dismissed.

The question thus presented for our decision is as to the meaning to be given to the words "any common carrier or other public utility" in the exemption clause of the act. Are these words to be given their natural and ordinary meaning and applied uniformly throughout the nation or are they to be deemed to refer only to those businesses which have been designated as common carriers or public utilities by some other law and which have been made subject to rate regulation by existing federal, state or local authorities? If the former, do they include the business of a public warehouseman? It will first be observed that neither "common carrier" nor "public utility" is defined by the act. There is no contention that the complainant is a common carrier. Consequently that phrase need concern us no further. Accordingly we must proceed to ascertain the concept which the Congress had in mind in using the phrase "public utility" in the exemption clause of the act.

It need hardly be pointed out that the act was passed in the emergency of war to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices. The threatened danger of disastrous inflation was and is nationwide and not local in character and the evident purpose of the act was to empower the Price Administrator to take needed action to combat it on a national scale. In this setting there is especially cogent reason for the application of the well established rule that descriptive terms used in a federal statute will, in the absence of language in the statute indicating a contrary intent, be given a general and uniform interpretation throughout the country.[7] The same considerations make equally applicable the rule that exceptions to a general policy embodied in a law should be

[7] Lyeth v. Hoey, 305 U. S. 188, 194 (1938). The rule has been quite recently reiterated by the Supreme Court, speaking through Justice Douglas, in Jerome v. United States, — U. S. — (1943), as follows: "But we must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law. That assumption is based on the fact that the application of federal legislation is nation wide (United States v. Pelzer, 312 U. S. 399, 402) and at times on the fact that the federal program would be impaired if state law were to control."

strictly construed.[8] Here there is no indication that the Congress intended that the Price Administrator's power to fix the prices charged by a business should be dependent upon whether or not in the state in which the business was carried on it was described as a public utility and regulated as such. Particularly in the light of the wide variety of businesses which have been designated and regulated as public utilities in some of the states[9] there is compelling force in the Price Administrator's argument that under such an interpretation of the act unjustified economic preferences, regional competition and other evils might well result. Likewise we find no indication that the Price Administrator was intended, as the complainant argues, to fix the rates of all common carriers and other public utilities whose rates are not otherwise regulated.[10]

We find in the act other indications of the Congressional intent that its application should be uniform throughout the country. Thus we observe that the exceptions to the broad sweep of the coverage of the act which appear in the proviso to Section 302(c) are very few in number. Then also the act expressly deprives all existing courts, federal and state, of jurisdiction to review the Price Administrator's regulations and confers sole jurisdiction in that field upon this court; a plain indication that Congress intended that a single standard of review of price regulations should be applied uniformly throughout the nation.

But even more persuasive is the fact that the exemption clause is wholly devoid of any qualifying language which would indicate that the Congress intended it to have a varying local application. The Congress did not, as it might have done,[10a] say that the public utilities

[8] Spokane & Inland R. R. v. United States, 241 U. S. 344, 350 (1916).

[9] Among the businesses which have been designated by state statutes as public utilities and regulated as such are the following: *abbatoirs*—N. C., Code of 1939, § 2832; *airports*—Fla., Stat., 1941, § 180.07; *armories*—N. C., Code of 1939, § 2832; *auditoriums*—N. C., Code of 1939, § 2832; *cemeteries*—N. C., Code of 1939, § 2832; *collecting systems*—Fla. Stat., 1941, § 180.07; *cotton gins*—Okla., Stat., Title 17, § 41; *creosoting and other paving works*—Minn., Mason's Stat. 1927 § 1786; *disposal works*—Fla., Stat., 1941, § 180.07; *distribution systems*—Fla., Stat., 1941, § 180.07; *docks* (*public*) Ala., Code of 1940, Title 48, § 302; *garbage and sewage disposal plants*—N. C., Code of 1939, § 2832; *golf courses*—Fla., Stat., 1941, § 180.07; *hospitals*—Fla., Stat., 1941, § 180.07; *ice plants*—Minn., Mason's Stat. 1927, § 1786; *intakes*—Fla., Stat., 1941, § 180.07; *jails*—Fla., Stat., 1941, § 180.07; *libraries*—N. C., Code of 1939, § 2832; *market houses*—N. C., Code of 1939; § 2832; *markets* (*public*) Minn., Mason's Stat. 1927, § 1786; *parks*—N. C., Code of 1939 § 2832; *play or recreation grounds*—N. C., Code of 1939, § 2832; *pipe lines*—Fla., Stat. 1941, § 180.07; *pumping stations*—Fla., Stat., 1941, § 180.07; *purification works*—Fla., Stat., 1941, § 180.07; *reservoirs*—Fla., Stat., 1941, § 180.07; *schools*—N. C., Code of 1939, § 2832; *sewerage*—Fla., (sewerage systems and intercepting sewers), Stat., 1941, § 180.07.—Minn., (sewer systems), Mason's Stat., 1927, § 1786,—N. C., (sewer systems) Code of 1939, § 2832; *slaughtering establishments*—Minn., Mason's Stat., 1927, § 1786,—N. C. (slaughter houses) Code of 1939, § 2832; *stone quarries and crushing works*—Minn., Mason's Stat., 1927 § 1786; *toll bridge or road*—Ala., Code of 1940, Title 48, § 302(8); *terminal* (*public*)—Ala., Code of 1940, Title 48, § 302(7); *wharves*—Ala., (public wharves) Code of 1940, Title 48, § 302(7)—N. C., Code of 1939, § 2832; *wells*—Fla., Stat., 1941, § 180.07.

[10] The acceptance of this view would in effect make of the Price Administrator a public utility commission for the State of Delaware in which state there is now no state regulation of the rates of common carriers or other public utilities.

[10a] Cf. Keifer & Keifer v. R. F. C., 306 U. S. 381, 395 (1939).

which were to be exempt from the operation of the act should be those businesses, and those alone, which were deemed to be public utilities and subject to rate regulation as such under existing federal or state law. Furthermore we think that such a definition of the term "public utility" would have extended its meaning far beyond anything that the Congress could have had in mind. For the use of the term by some of the states has been so broadened that in one of them, to cite an extreme case, it is defined to include "every corporation, or person, now or hereafter declared by law to be affected with a public interest."[11] But it is settled that the mere exercise of a state's power to regulate the rates and charges of a particular business which the state deems to be affected with a public interest does not constitute such a business "in the accepted sense of the phrase, a public utility." Nebbia v. New York, 291 U. S. 502, 531 (1934).

The legislative history of the act also lends support to the view that the Congress intended to exempt from the operation of the act all public utilities even though not subject to other existing regulation. Thus in the hearings before the House Committee on Banking and Currency the following testimony was given by Leon Henderson, then acting as Administrator of the Office of Price Administration and Civilian Supply under Executive Order:[12]

> "Mr. Henderson. * * * Now, as to the utilities. There is, as the members are aware, an adequate set of regulations as to the charges which utility companies can make. These, again, are based upon a long series of judicial determinations, of State regulations, and of State laws. It seemed to those drafting the bill that this was an area which was not likely to give difficulty or to cause, so far as they could see at that time, any inflationary trend. The bill is designed to control an emergency inflationary situation and has left them out, just as it has transportation rates. There are questions peculiar to utilities and none of them, so far as I see at the present time, would make necessary further regulation by means of a price-control bill."
>
> . . .
>
> "Mr. Patman. I do not care for an extended answer, unless you think it is necessary to give it.
>
> You include in this bill metals, chemicals, durable goods, and agricultural products, and you also include services in the bill except, of course, that it does not apply to wages and salaries paid by an employer to an employee; but otherwise services are included. But it does not include transportation or utility rates.
>
> Mr. Henderson. No.
>
> Mr. Patman. That is quite a large item, and you said, as I understood you, that you were satisfied with the rate-making bodies in the States, and that that was the reason you did not ask that utility and transportation rates be included.
>
> Do I understand that correctly?
>
> Mr. Henderson. I did not mean to limit it to existing regulatory mechanisms both in transportation and utilities.

[11] Colorado, Stat. Ann. (1935), Ch. 137 § 3.

[12] Excerpts from transcript of hearings before the Committee on Banking and Currency of the House of Representatives held on August 6 and 15, 1941, pp. 54, 55, 626, on H. R. 5479 (superseded by H. R. 5990), 77th Cong. 1st Sess.

> What I said was that the transportation rates themselves were already under regulation by Federal and State agencies, and I also feel that that is not an item, even in the absence of that regulation, to be brought under commodity price regulation."

In the House of Representatives Representative Steagall, the Chairman of the Committee on Banking and Currency, who was in charge of the bill on the floor, said:[13]

> "Mr. Steagall. The bill also provides explicitly in section 302(c) that nothing in the act is to be construed to authorize the regulation of compensation paid by an employer to any of his employees, or the regulation of rates charged by any common carrier, or other public utility, which are usually subject to adequate control by State or other Federal agencies. In cases of conflict between State regulation of enterprise of a non-public-utility character and Federal regulation under this bill, the Federal regulation would, of course prevail."

We think these statements indicate that what the Congress had in mind was the exemption of all public utilities as ordinarily understood. From the statements of both Mr. Henderson and Mr. Steagall it is evident that they contemplated that some of the public utilities which they proposed to exempt might not be presently subjected to other rate regulation. Nevertheless it was thought that the public utilities did not present a serious price control problem "even in the absence of that regulation." In reaching this conclusion the Congress may well have had in mind what Mr. Henderson's testimony suggested, namely, that public utility rates "are based upon a long series of judicial determinations" even though not subject to statutory regulation. For it is well established that at common law a business of a public nature and invested with a monopoly was under the duty of furnishing its service to the public at reasonable rates.[14] And this duty has been enforced in equity.[15] Consequently it was entirely reasonable to leave out of the price fixing procedure set up by the statute the whole area of public utility rates, since most of them were already subject to statutory regulation and the remainder were limited by fixed principles of law.

Finally we cannot overlook the fact that by Amendment No. 1 to Supplemental Regulation No. 11, the Price Administrator granted complete exemption to nine classes of common carriers and other public utilities without any regard to their status as to existing rate regulation. This contemporaneous administrative construction of the scope of the exemption appears to have met with the approval of the Congress, for in Section 1 of the amendatory act of October 2, 1942,

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[13] Congressional Record, Vol. 87, p. 9308.

[14] Allnutt v. Inglis, 12 East. 527 (1810), 104 Eng. Repr. 206. For an illuminating discussion of this common law duty see McCurdy, The Power of a Public Utility to fix its Rates and Charges in the absence of Regulatory Legislation, 38 Harv. L. Rev. 202 (1924), especially pp. 206, 207 and note 12, in which the cases are collected.

[15] City of Madison v. Madison Gas & Electric Co., 129 Wis. 249, 108 N. W. 67 (1906), and cases therein cited.

Chap. 578, 2d Sess., 77th Cong.,[16] the words "common carrier or other public utility" are again used without qualifying language. It is true, as the complainant says, that these words were used in connection with a provision requiring a public utility making a general increase in rates to give notice to a federal agency and to consent to the intervention of the agency "before the Federal, State, or municipal authority having jurisdiction to consider such increase." But this clause must be considered in the light of the fact that the provision was intended to give to the federal authorities an opportunity to prevent undue increases in utility rates in cases in which no such opportunity was afforded by the original act. The provision was substituted in conference for an amendment by Senator Norris which would have given the President veto power over such increases.[17] In view of its purpose to extend the area of federal action it can hardly be construed as at the same time intended to restrict that area by enlarging the original exemption of public utilities so as to include in the exempt class all those businesses which are described and regulated as public utilities under the statutes of any state. The act must rather be considered in the light of the fact that the traditional public utilities are almost universally subject to statutory rate regulation and if not are subject to a common law duty to maintain reasonable rates which duty is enforceable by the courts. Indeed the courts may well be included among the state authorities having jurisdiction to consider rate increases before which the act provided that the federal agency should be given the right to intervene.

We conclude, therefore, that the exemption of public utilities by Section 302(c)(2) was intended to have a uniform meaning and effect throughout the United States without regard to the provisions of state law, and that the fact that the complainant is designated as a public utility by the constitution and laws of California is not determinative of its right to the exemption. The question remains whether a public warehouseman, such as the complainant, is a public utility within the uniform nationwide meaning which is to be given to that term as it is used in the Emergency Price Control Act.

Our investigation indicates that the use of the phrase "public utility" in the sense in which we are now considering it is of comparatively recent origin.[18] The data which we have considered do not disclose any clear criteria from which a precise definition of the phrase "public utility" may be constructed. It is suggested that one of the elements is the enjoyment of a public franchise to carry on the business in question. It is clear, however, that public franchises may also be held by those whose activities are public utilities solely in the

[16] "The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: *Provided*, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase."

[17] See statements of Senator Norris, Cong. Record, Vol. 88, pp. 7343-7346 and of Senator Brown, Cong. Record, Vol. 88, pp. 7970, 7971.

[18] See Goddard, The Evolution and Devolution of Public Utility Law, 32 Mich. L. Rev. 577, 578 (1934).

sense that they are state regulated. Certainly any person who is by statute authorized to operate his business only upon receipt of a state issued certificate of convenience and necessity may be said to have a franchise from the state. Then again it is urged that monopoly and its attendant lack of competition are essential marks of a public utility. But while monopoly and lack of competition are present in the case of some undoubted public utilities, there are others, carriers by motor vehicle for example, whose business is highly competitive.

Finally it is suggested that the legal duty to serve without discrimination all those who desire the service is the unmistakable badge of a public utility. While all public utilities doubtless have such a duty it is by no means confined to them. Thus inkeepers, who have nowhere been described as public utilities, have from early times been subject to the obligation to receive and afford proper entertainment to every one who offers himself as a guest, if there be sufficient room for him in the inn, and no good reason for refusing him.[19] Nor is the concept of one engaged in a public employment of assistance. At common law the surgeon, the tailor, the smith, the victualer, the baker, the miller, the innkeeper, the carrier, the ferryman and the wharfinger were considered to be engaged in public employment[20] yet the first seven of these have never been suggested as coming within the definition of public utility.

Some light is thrown upon the question whether a public warehouseman is a public utility within the meaning of the act by the language of the act itself. As we have seen, the very section which contains the proviso exempting public utilities states that the term "commodity" as used in the act "includes services rendered . . . in connection with the . . . storage . . . of a commodity." Here is definite indication that storage of commodities, the business of a public warehouseman, is intended to be covered by the act. In the hearings upon the bill and in its consideration upon the floor of the Senate the public utilities referred to as involved in the proposed exemption included electric, gas, water and telephone companies but no mention was made of public warehousemen.

It is a fundamental rule of statutory construction that in the absence of a statutory definition, words used in the statute are to be given their natural and ordinary meaning.[21] Among the data to be considered in determining the natural and ordinary meaning of "public utility" is the manner in which the term has been used in state legislation.[22] Electric, gas, light, heat, power, water, telephone and telegraph companies which the Price Administrator has treated as exempt public utilities are enterprises of the types which are now almost universally treated as public utilities for the purpose of regulation under state statutes. They are generally classified as public utilities in the manuals used by the financial community.[23] On the other hand only three states include all warehouses in their statutory

[19] Hawthorn v. Hammond, 1 C. & K. 404 (1844); Rex v. Ivens, 7 Car. & P. 213 (1835); Gordon v. Silber, 25 Q. B. D. 491 (1890); 28 Am. Jur., Innkeepers, § 46; 32 C. J., Innkeepers § 28.

[20] Wyman, Public Service Corporations §§ 6-16, incl.

[21] Ozawa v. United States, 260 U. S. 178, 194 (1922).

[22] Cf. Eagan v. Commissioner of Internal Revenue, 43 F. 2d 881, 883 (C. C. A. 5, 1930).

[23] Cf. Moody's Manual of Public Utilities (1942 Ed.) p. a3.

definition of public utilities,[24] while seven others include limited types of warehouses.[25] Thirty-eight states and the District of Columbia do not define warehouses of any kind as public utilities. In the financial manuals warehouse companies are classified as industrials.[26]

Complainant points to the decision of the Supreme Court in Munn v. Illinois, 94 U. S. 113 (1876) which held that the rates of a public warehouseman were subject to regulation by a state and it argues that its business was thereby adjudicated to be a public utility. The decision in the Munn case was based upon the proposition that such a business was "affected with a public interest" and consequently its charges might be regulated by the state under the police power without violation of the Fourteenth Amendment. The court did not discuss the question as to whether the business was a public utility. Indeed that term was not used in the opinion. We need not here enter the interesting controversy as to whether the use in that decision of Sir Matthew Hale's concept of a business "affected with a public interest" was appropriate,[27] for the concept has subsequently been broadened by the Supreme Court to be the equivalent of "subject to the exercise of the police power."[28] It follows that today a purely private business which has no franchise from the state and enjoys no monopoly may be subject to price regulation as a business affected with a public interest if a reasonable basis for such action can be shown. As the court said in the Nebbia case (p. 536) "The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good."

Pursuant to this broader concept of the police power many of the states have in recent years widely extended the area of price regulation. In so doing, as in the case of California with public warehousemen, they have frequently described the businesses thus regulated as public utilities. Whether this was in the mistaken belief that it was necessary to so designate them in order to bring them within the police power is not material, for it is obvious that this greatly widened field of regulated business could not have been intended by Congress to be comprehended within the meaning of the phrase "public utility" as used in the act. Such a construction would remove from the jurisdiction of the Price Administrator a major portion of the field of price regulation and make the exemption clause the rule rather than the exception. Indeed, it may be said that the Emergency Price Control Act itself is a Congressional determination that, at least in wartime, every business in the country is so affected with a public interest as to require statutory control of its prices.

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[24] California—Gen. Laws (Deering, 1937), Act 6386, § 2 (dd); Indiana—Stat. Ann. (1933, Burns), §§ 67-501, 67-201, 67-202; South Dakota—Code (1939), § 52.0201.

[25] Idaho—Code Ann. (1932), §§ 59-128, 59-129; Illinois—Stat. Ann. (Jones), §§ 141.001(1), 141.011; Maine—Rev. Stat. (1930) Ch. 62, p. 1031; Nevada—Comp. Laws (1929), § 6106; North Dakota—Comp. Laws (Supp. 1913-1925), § 4609e2; Utah—Rev. Stat. (1933), § 76-2-1; Washington—Rev. Stat. Ann. (Rem.), § 10344.

[26] Cf. Moody's Manual of Industrials (1942 Ed.) pp. a83, a91.

[27] See the discussion of this question by McAllister, Lord Hale and Business Affected with a Public Interest, 43 Harv. L. Rev. 759 (1930) and by Hamilton, Affectation With Public Interest, 39 Yale L. J. 1089 (1930).

[28] Nebbia v. New York, 291 U. S. 502, 533 (1934).

Professor (now Justice) Frankfurter in his book "The Public and its Government" (1930) p. 81, lists as typical public utilities those enterprises "which furnish light, heat, power, water, transportation, and communication." These, as we have seen, are the types of business which the Price Administrator has exempted as public utilities. We think that the Congress intended by the phrase "public utility" to comprehend enterprises of these general types. We are not called upon, however, to delimit the entire area which the term was intended to cover, but merely to decide whether a public warehouseman is within it. After consideration of all the relevant data we conclude that a public warehouseman operating under the California law is not a "public utility" within the meaning of Section 302(e)(2) and as such exempt from the General Maximum Price Regulation promulgated by the Price Administrator. It follows that the latter committed no error in denying the complainant's protest.

The complaint is dismissed.

MAGRUDER, J. With some hesitation, I concur in the result reached by Judge Maris. This is one of those unfortunate cases where doubts would remain whichever way the case was decided.

Judge Vinson in his dissenting opinion has amply demonstrated that complainant has the characteristics of a "public utility" within the connotation of that phrase in widespread usage. He treats the phrase as one of art, and so treating it, he is sure only of this, if I understand him correctly: that a business is a "public utility" if it has all four of the characteristics mentioned, and if, in addition, its rates are actually being regulated by some administrative agency. He does not decide whether a business would be exempt within the meaning of § 302(e) if its rates were not in fact being regulated by some governmental agency, even though it had the four described characteristics. And he suggests the possibility that a business might be deemed a "public utility" even though not possessing one or another of the four characteristics—for instance, if the business, though possessing the other earmarks, did not bear an intimate connection with the process of transportation and distribution, or was not required to obtain a certificate of convenience or necessity before entering the field.

If Judge Vinson's view were accepted, the Price Administrator would have a formidable preliminary task before issuing price regulations applicable to a great variety of businesses. He would have to decide what are the indispensable characteristics of a "public utility"—a phrase which Judge Vinson, after exhaustive research, concedes to be "freighted with refinements" and "not susceptible of precise definition." Then the Administrator would have to scrutinize the statutes of the forty-eight states to see what businesses have had impressed upon them by local law the characteristic obligations of a public utility. Nor would his investigation end there; Judge Vinson points out that the due process clause limits "the power of the states to create public utilities," and the Administrator would have to wrestle with the application of the Supreme Court's decision in *New State Ice Co.* v. *Liebmann*, 285 U. S. 262.

But I think a candid examination of the legislative history indicates that Congress in § 302(e) was probably not using "public util-

ity" as a term of art; if it had been, Congress would hardly have left without precise definition so elusive a phrase. Congress was, I am inclined to think, using the term loosely and somewhat vaguely as comprehending the familiar and garden variety businesses which would immediately suggest themselves to the lay mind when the phrase "public utility" is used, and which universally, or almost universally, are under existing federal, state or municipal rate regulation. In these circumstances we should attach persuasive weight to the official interpretation of the exemption in § 302(e), made shortly after the passage of the Act by the administrative official who sponsored the legislation and upon whom Congress imposed the duty of carrying it out. It is significant in this connection, as pointed out by Judge Maris, that after the Administrator made his contemporaneous interpretation of the scope of the exemption, Congress in § 1 of the amending act of October 2, 1942 (56 Stat. 765), again used the words "common carrier or other public utility" without qualifying language.

Judge Maris concurs in the foregoing views.

VINSON, *Chief Judge*, dissenting: The Emergency Price Control Act of 1942, as amended (the Price Act), contains a provision[1] which specifically exempts the rates charged by "*any common carrier or other public utility*" from regulation by respondent, the Price Administrator. The term, "public utility," is not defined or otherwise explained in the Act. The hearings and debates in Congress have not provided specific guidance as to the comprehensiveness with which the term was employed.

In the present controversy the complainant, which conducts the business of a public warehouse in the City of Los Angeles, California, contends that it is a "public utility," and, therefore, entitled to exemption from rate control under the terms of the Act.

The relevant portions of the Price Act are Section 2 (a), which authorizes the respondent to issue price regulations for *commodities* whose price has risen or threatens to rise in a manner inconsistent with the purposes enumerated in Section 1 (a)[2] of the Act, together with Section 302 (e) (2) which provides that

> . . . The term "commodity" . . . includes services rendered . . . in connection with the processing, distribution, *storage* . . . of a commodity: *Provided*, That nothing in this Act shall be construed to authorize the regulation of . . . (2) rates charges by any common carrier or other public utility . . .[3] (Italics supplied)

By virtue of the aforesaid authorization, the Price Administrator on April 28, 1942, issued a General Maximum Price Regulation[4] which fixed as a seller's maximum price the highest price charged by him

[1] January 30, 1942, c. 26, Sec. 302 (e), 56 Stat. 36; 50 U.S.C.A. (App.) Sec. 942 (e).

[2] January 30, 1942, c. 26, Sec. 1 (a), 56 Stat. 23; 50 U.S.C.A. (App.) 901 (a).

[3] Footnote 1, *supra*.

[4] 7 F. R. 3153.

during the month of March, 1942. Section 10 of the Regulation[5] provided that it should not apply to such services as might be specified by supplementary regulations or amendments thereto. On June 18, 1942, the Price Administrator issued Supplementary Regulation No. 11,[6] by which it was declared that the General Maximum Price Regulation (issued in April) would not apply to certain services until July 1, 1942. Among the services thus treated were "(2) Commercial storage and warehousing and services incident thereto:" On June 23, 1942, the Price Administrator issued Amendment No. 1[7] to Supplemental Regulation No. 11, providing for the exception of certain services from the operation thereof. Among the services thus excepted were all electricity, gas, light, heat, power, and water companies which were furnishing or supplying "as public utilities." In addition, the Amendment provided the following exemption:

> (68) Transportation of commodities by . . . common carriers by rail, water, motor, pipe line, or other means of conveyances, rates charged for: *Provided, however*, That *charges for storage and warehousing* and all other services incident thereto by any person shall *not* be excluded from the General Maximum Price Regulation. (Italics supplied)

The upshot of this series of regulations was to place complainant in a position wherein it would be prohibited after July 1, 1942, from taking advantage of a rate increase for its warehousing services which had been allowed by the California Railroad Commission two months previously. Asserting itself to be a public utility within the meaning of the exemption set forth in Section 302 (c) of the Act, and therefore aggrieved by the failure of the Price Administrator to exempt its business from the General Maximum Price Regulation, the complainant filed a timely protest[8] with the Price Administrator. The Price Administrator denied the protest, and the complainant filed the present complaint asking this court to set aside the General Maximum Price Regulation, Supplementary Regulation No. 11, and Amendment No. 1 thereto, insofar as they purport to regulate the charges of the complainant.

The parties agree that, in the absence of statutory definition or other means of attaining the legislative intention, the term "public utility," as used in the Act, must be given its natural and customary significance. We are obliged to determine, in a measure, this connotation.

The term "public utility" is not susceptible of a precise definition. It is a concept of comprehensive content, freighted with refinements, and one whose determination for general application is beyond the scope of this opinion. Fixing its formula has been frequently dodged. It is not our purpose or need, however, to develop the definition to a conclusion—to present a workable formula or pattern by which any business may be gauged and labeled.

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5 7 F. R. 3155.

6 7 F. R. 4543.

7 7F. R. 4738.

8 As provided for in Sec. 203 of the Act, 56 Stat. 31, C. 26, sec. 203; 50 U. S. C. A. (App) 923. Although respondent granted complainant the increase allowed by the California Commission two days after denial of the protest, he has the right under Sec. 204 (a) to modify or rescind that order at any time.

I do not regard a public utility as having any tangible existence; it is like a corporation in that respect. The concept "public utility" is, as I see it, merely a bundle of attributes or characteristics, and our problem, here, simply stated is first to consider some of the fundamental attributes which comprise that bundle and, then, to see if these attributes have been applied, affixed, or adopted as regards the complainant's public warehouse.

I. *A Public Utility is, at the least, a Business Affected with a Public Interest.*

In the narrowing process of determining which of the countless enterprises extant are public utilities, I think that the most appropriate spring board is that principle contained in the landmark case of *Munn* v. *Illinois*.[9] A public utility is, at the least, a business affected with a public interest.[10] A "business affected with a public interest," however, is a concept no more concise than the one with which we are concerned. It has been described as a business which bears such a peculiarly close relation to the public that there arises an affirmative obligation upon the part of the operators to be reasonable in dealing with their customers.[11] It has been designated as a business wherein exist peculiar conditions bearing such a substantial and definite relation to the public interest as to justify an indulgence of the legal fiction of a grant by the owner to the public of an interest in the use,[12] and permitting the imposition of governmental regulation. Thus although the property continues to be private, the public has attained an interest. It has been observed that there is perhaps not a single business which may not be subjected to some measure of public regulation.[13] It is simply a question of the character and degree of the control, and an activity properly designated as "affected with a public interest" is subject to more extensive regulation. The mere declaration by the legislature, however, that a business is affected with a public interest is not conclusive; the attempted regulation is always a subject of judicial inquiry,[14] the due process clause being the staying hand.[15]

Some clarification of the concept is found in *Wolff Packing Co.* v. *Industrial Court*,[16] wherein the Supreme Court said:

> It is very difficult under the cases to lay down a working rule by which readily to determine when a business has become "clothed with a public interest." All business is subject to some kinds of public regulation; but when the public becomes so peculiarly dependent upon a particular business that one engaging therein subjects himself to a more intimate public regula-

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[9] 94 U. S. 113.

[10] Nowata County Gas Co. v. Henry Oil Co., 269 Fed. 742, 746 (1920) (C.C.A. 8th).

[11] Wolff Co. v. Industrial Court, 262 U. S. 522, 536.

[12] Tyson & Brother v. Banton, 273 U. S. 418, 438. Cf. Munn v. Illinois, 94 U. S. 113, 126.

[13] New State Ice Co. v. Liebmann, 285 U. S. 262, 273.

[14] Tyson & Brother v. Banton, 273 U. S. 418, 431; Wolff Co. v. Industrial Court, 262 U. S. 522, 536, 539.

[15] New State Ice Co. v. Liebmann, 285 U. S. 262, 302.

[16] 262 U. S. 522, 538, 539.

> tion is only to be determined by the process of exclusion and inclusion and to gradual establishment of a line of distinction. . . . To say that a business is clothed with a public interest, is not to determine what regulation may be permissible in view of the private rights of the owner. The extent to which an inn or a cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared. To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. The extent to which regulation may reasonably go varies with different kinds of business. The regulation of rates to avoid monopoly is one thing. The regulation of wages is another. A business may be of such character that only the first is permissible, while another may involve such a possible danger of monopoly on the one hand, and such disaster from stoppage on the other, that both come within the public concern and power of regulation.

No particular manner of operation or form of state control seems to be a requisite characteristic of a business affected with a public interest. It has been held that a business was impressed with a public interest even though the public might not have the right to demand and receive service.[17] The enjoyment of a monopolistic status is clearly not necessary.[18] Similarly it has been held that a business need not be dependent upon a franchise, certificate of public convenience and necessity, or other form of grant, in order to be clothed with a public interest.[19]

What, then, is it which distinguishes a public utility from a mere business affected with a public interest? The informing opinion of *Wolff Packing Company* v. *Industrial Court* has drawn a formal comparison and distinction which divides public businesses into three classes:

> (1) *Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.*
>
> (2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs and grist mills. . . .
>
> (3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject

17 Tyson & Brother v. Banton, 273 U. S. 418, 434; German Alliance Insurance Co. v. Kansas, 233 U. S. 389.

18 Nebbia v. New York, 291 U. S. 502, 531, 534; Brass v. Stoeser, 153 U. S. 391, 403.

19 Nebbia v. New York, 291 U. S. 502, 531, 534; Munn v. Illinois, 94 U. S. 113.

in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly. . . .[20] (Italics supplied)

This oft-cited passage from the *Wolff* case purports to do no more than outline some of the fundamental distinctions between a public utility and a business affected with a public interest. It is necessary to develop those fundamental differences in order to appreciate fully the multiple refinements of the former concept.

II. *The Nature of the Enterprises in the Public Utility Family.*

The concept, "public utility," contemplates more than a business affected with a public interest.[21] To the date of my observation, at least, it has been limited in its application to only a particular class of public businesses. Because the explanation of this limitation is of historical origin, perhaps the best insight is afforded by referring, in brief, to the emergence and expansion of the public utility family. It is clear that the common carrier, by virtue of what was accepted as its duties and obligations to the public at common law, was the Adam of this family, and that the members thereof grew as the common carrier concept was extended. Transportation thus furnished the point of departure, and the list grew by analogy.[22] Congress may have recognized this intimate connection when it grouped "common carriers and *other* public utilities" (italics supplied) into a single exemption in Section 302 (e).

The participation by a business in activities *intimately connected with the processes of transportation and distribution*, therefore, was the characteristic which caused it to be subjected to the impositions implicit in public utility regulation. A somewhat exhaustive enumeration of the businesses which frequently have been designated, operated, and regulated as public utilities illustrates that the gradual growth of the family has involved no departure from the initial concept, but merely reflected scientific progress in the facilities, auxiliaries, and varieties of transportation and distribution: viz., bridges, buses, canals, cotton gins, docks, electric companies, elevators, express companies, ferries, gas companies; heating companies, pipe lines, public warehouses, railroads, stockyards, truck lines, telegraphs, telephones, water companies, wharfingers, vessels, etc.

As supplying Supreme Court recognition of this approach, the language of Lamar, J., dissenting in the Supreme Court decision of *German Alliance Co.* v. *Kansas*,[23] is significant:

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[20] 262 U. S. 522, 535.

[21] But see Dissent of Brandeis, J. in *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 283; State v. Barnes, 22 Okl. 191, 97 Pac. 997.

[22] See G. H. Robinson, The Public Utility Concept in American Law (1928), 41 Harv. L. Rev. 278, and the authorities therein cited.

[23] 233 U. S. 389, 426.

> . . . And as further pointing out the characteristics of the public use justifying the fixing of prices, it will be noted that . . . they all have direct relation to the business or facilities of transportation or distribution—to transportation by carriers of passengers, goods or intelligence by vehicle or wire;—to distribution of water, gas or electricity through ditch, pipe or wire; to wharfage, *storage* or *accommodation of property before the journey begins, when it ends, or along the way.*
>
> When thus enumerated, they appear to be grouped around the common carrier as the typical public business and all employing in some way property devoted to a public use. (Italics supplied)

On the other hand, such decisions of the Supreme Court as those holding the business of selling milk[24] and insuring against fire losses[25] to be affected with a public interest illustrate the proposition that, as regards a mere business affected with a public interest, the traditionally close association with transportation and distribution service is not a necessary characteristic.

III. *For an Enterprise to be Constituted a Public Utility, Its Services Must be Made Available Upon Demand at Reasonable and Non-Discriminatory Rates.*

An examination of numerous decisions wherein Federal and State courts have had occasion to consider the nature and the characteristics of public utility enterprises reveals that a distinguishing feature of that class of businesses is considered to be the presence of an obligation to serve the public upon demand[26] at reasonable[27] and non-discriminatory[28] rates. In considering a particular business, the

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[24] Nebbia v. New York, 291 U. S. 502.

[25] German Alliance Insurance Co. v. Kansas, 233 U. S. 389.

[26] Wolff Co. v. Industrial Court, 262 U. S. 522, 535; Producers Transportation Co. v. Railroad Comm. of California, 251 U. S. 228, 231; Pulitzer Pub. Co. v. Federal Communications Comm., 66 App. D. C. 124, 126, 94 F. (2d) 249, 251; Depauw University v. Pub. Ser. Comm. of Oregon, 253 Fed. 848, 849; Batesville Telephone Co. v. Pub. Ser. Comm. of Indiana, 38 F. (2d) 511, 514, rev. 46 F. (2d) 226 (C.C.A. 7th), 284 U. S. 6; Publix Cleaners v. Florida Dry Cleaning and Laundry Board, 32 F. Supp. 33, 34; Parsons v. Detroit & Canada Tunnel Co., 15 F. Supp. 986, 997, aff. 92 F. (2d) 833 (C.C.A. 6th); Illinois Power & Light Corp. v. City of Centralia, 11 F. Supp. 874, 893, remanded 89 F. (2d) 985 (C.C.A. 7th); State ex rel Bricker v. Industrial Gas Co., 58 Ohio App. 101, 16 N. E. (2d) 218; Ocean Park Pier Amusement Corp. v. City of Santa Monica, 40 Cal. App. (2d) 76, 104 P. (2d) 668, 671, 879; Richardson v. Railroad Comm. of Calif., 191 Cal. 716, 218 Pac. 418, 420; Highland Dairy Farms Co. v. Helvetia Milk Condensing Co., 308 Ill. 294, 139 N. E. 418, 420; Ford Hydro Electric Co. v. Town of Aurora, 206 Wis. 489, 240 N. W. 418, 420; Southern Ohio Power Co. v. Public Utilities Comm. of Ohio, 110 Ohio St. 246, 143 N. E. 709, 701, 702; See Restatement of Torts (1934), Sec. 191, Comment a, b; Allen v. Railroad Comm. 179 Cal. 68, 175 Pac. 466, 474, cert. denied 249 U. S. 601.

[27] Parsons v. Detroit & Canada Tunnel Co., 15 F. Supp. 986, 997, aff. 92 F. (2d) 833 (C.C.A. 6th); Richardson v. Railroad Comm. of Calif., 191 Cal. 716, 218 Pac. 418, 420; Southern Ohio Power Co. v. Public Utilities Comm. of Ohio, 110 Ohio St. 246, 143 N. E. 709, 701, 702; Allen v. Railroad Comm., 179 Cal. 68, 175 Pac. 466, 474, cert. denied 249 U. S. 601.

[28] Parsons v. Detroit & Canada Tunnel Co., 15 F. Supp. 986, 997, aff. 92 F. (2d) 833 (C.C.A. 6th); Illinois Power & Light Corp. v. City of Centralia, 11 F. Supp. 874, 893, remanded 89 F. (2d) 985 (C.C.A. 7th); State ex rel Bricker v. Industrial Gas Co., 58 Ohio App. 101, 16 N. E. (2d) 218; Highland Dairy Farms Co. v. Helvetia Milk Condensing Co., 308 Ill. 294, 139 N. E. 418, 420.

greatest emphasis is repeatedly placed upon these characteristics. In *Parsons* v. *Detroit & Canada Tunnel Co.*,[29] to select one of the many expressions, a Federal court said:

> A public utility is generally known in the law as a business organization which regularly supplies the public with some commodity or service. *The distinguishing characteristic of a public utility* is the devotion of private property by the owner . . to such a use that the public generally, or that part of the public which has been served and has accepted the service, *has the right to demand that the use or service*, so long as it is continued, *shall be furnished without unreasonable discrimination* with reasonable efficiency and *under proper and reasonable charges*. (Italics supplied)

In *Nebbia* v. *New York*,[30] in denying that a dairy was a public utility "in the accepted sense," the Supreme Court spoke of a public utility as

> . . . a business . . . in which property is devoted to an enterprise of a sort which the public itself might appropriately undertake, or one whose owner relies on a public grant or franchise for the right to conduct the business, *or in which he is bound to serve all who apply* . . . . (Italics supplied)

In *Pulitzer Pub. Co.* v. *Federal Communications Commission*,[31] the United States Court of Appeals for the District of Columbia denied public utility status to radio broadcasting companies, observing that

> . . . we never have said that a radio broadcasting station is a public utility in the sense in which a railroad is a public utility. Generally speaking, that term comprehends *any facility* employed in rendering quasi public service such as waterworks, gas works, railroads, telephones, telegraphs, *etc. The use and enjoyment of such facilities the public has the legal right to demand;* but its right to the use and enjoyment of the facilities of a privately owned radio station is of a much more limited character. . . . The licensee of a radio station chooses its own advertisers and its own program. (Italics supplied)

In the California decision of *Allen* v. *Railroad Commission*,[32] the court, in discussing the public utility concept, dealt, for purposes of illustration, with the business of a butcher, excluding that business from the contested class on the following basis:

> . . . He (a butcher) still has the unquestioned right to fix his prices; he still has the unquestioned right to say that he will or will not contract with any member of the public. What differentiates all such activities from a true public utility *is this, and this only:* That the devotion to public use must be of such character that the *public generally*, or that part of it which has been served and which has accepted the service, *has the right to demand*

[29] 15 F. Supp. 986, 987; aff. 92 F. (2d) 833 (C.C.A. 6th).

[30] 291 U. S. 502, 531.

[31] Pulitzer Pub. Co. v. Federal Communications Comm., 68 App. D. C. 124; 126, 94 F. (2d) 249, 251.

[32] 179 Cal. 68, 175 Pac. 466, 474, cert. denied 249 U. S. 601.

that that service shall be conducted, so long as it is continued, with reasonable efficiency *under reasonable charges*. Public use, then, means the use by the public and by every individual member of it, as a legal right. Such is not only the accepted significance of the phrase by the great weight of authority as expounded by Mr. Lewis (Eminent Domain, sec. 164 et seq.), but is the definition repeatedly announced by this court. . . .

In *Terminal Taxicab Co.* v. *District of Columbia*,[33] the Supreme Court refused to consider garage call service in connection with taxicabs as a public utility, stating:

. . . But however it may have been in earlier days as to the common callings, it is assumed in our time that an invitation to the public to buy does not necessarily entail an obligation to sell. It is assumed that an ordinary shopkeeper may refuse his wares arbitrarily to a customer whom he dislikes, and although that consideration is not conclusive . . . it is assumed that such a calling is not public as the word is used.

The Restatement of Torts adopts this classification:

Sec. 191. Comment:

a. *What constitutes a public utility.* What amounts to such a holding out to the public as to make an enterprise a public utility is beyond the scope of the Restatement of this Subject. The phrase public utility is used in the Restatement of this Subject to describe a person, corporation or other association carrying on an enterprise for the *accommodation of the public*, the members of which as such *are entitled as of right to use* its facilities. Usual instances of a public utility are common carriers, common innkeepers, telegraph and telephone companies and gas and electric companies. (Italics supplied)

b. A patron of a public utility is one who is exercising his right as a member of the public to make use of services of a public utility. . . .

The obligation to the public is restated in virtually every decision dealing with the subject matter. Unquestionably Congress was informed as to this criterion. Generally speaking, its members are as familiar with general substantive legal principles as are the courts—often they are better informed as to basic economic and business concepts. This imputation is more than a presumption. An excellent illustration of what Congress intends in its use and understanding of the term "public utility" is illustrated by a passage from the Foreign Trade Zones Act of 1934:[34]

Operation of zone as public utility; cost of customs service. Each zone shall be operated as a public utility, and all rates and charges for all services or privileges within the zone shall be fair and reasonable, and the grantee shall afford to all who may apply for the use of the zone and its facilities and appurtenances uniform treatment under like conditions. . . .

[33] 241 U. S. 252, 256.

[34] June 18, 1934, c. 590, Sec. 14, 48 Stat. 1001; 19 U.S.C.A. 81n.

I conclude, then, that a public utility is uniformly understood, aside from a particular statutory classification, to be, at least, a business affected with a public interest, closely associated with transportation or distribution, and under an obligation to afford its services to the public generally at reasonable and non-discriminatory rates. At this stage of the discussion, therefore, we are, in our quest for the concept in question, at these relative positions: We have removed public utilities at least two steps from the broader category of "business affected with a public interest," and at least three steps from the still broader category of "business in general."

IV. *Franchise and Monopoly.*

In the distinguished array of decisions wherein the concept has been defined, it has uniformly been considered one of the fundamental characteristics of a public utility that it be a business so constituted as to enjoy comparative freedom from commercial competition. This status is attained in two ways: (1) A business may practically succeed in eliminating its competitors, squeezing them out of the field or reducing their activities below the level of serious competition. Sometimes by preempting the field and by the exertion of economic pressure, a business may preclude the emergence of a serious competitor. (2) The state, itself, may place an enterprise in this status. The legislature may feel that the economic interests of the general public will be better served by curtailing the right to enter a particular calling, that the conduct of a particular activity is so packed with social and economic ramifications as to require its operations to be limited to a small or controlled number of companies. The State, therefore, exercises its power to exclude or prohibit *unconditionally* the establishment of such an enterprise.[35] The discretionary grant of a franchise or certificate of public convenience and necessity, is the device by which the State effects this policy. There exists a monopoly, or quasi-monopoly, which is state-created and state-sanctioned. But the State may be very generous with its grant of privileges. It may grant concurrent franchises, depending upon the nature of the business and the public interest to be served, to two or even more businesses. Exclusiveness is clearly not an essential feature of a franchise;[36] in fact, there are presumptions against the creation of an absolutely monopolistic status.[37] This control by franchise is to be distinguished, however, from the lesser right of the state, generally, to *condition* the establishment or continuance of a business upon the maintenance of certain sanitary, safety, or similar supervisory standards, or upon the maintenance of maximum seller's prices.

The Price Administrator has submitted a definition of the concept public utility, as he believes the term should be interpreted, which recognizes the franchise or monopoly characteristic. On page 31 of his brief he says:

> ...at the time Congress enacted the Emergency Price Control Act the term "public utility" had a general significance with

[35] See Brandeis, J., Dissenting in New State Ice Co. v. Liebmann, 285 U. S. 262, 304.

[36] Frost vs Corporation Comm., 278 U. S. 515, 521; Joplin v. Light Co., 191 U. S. 150; Illinois Power & Light Corp. v. City of Centralia, 11 F. Supp. 874, 878, remanded 89 F. (2d) 985 (C.C.A. 7th).

[37] Joplin v. Light Co., 191 U. S. 150, 157.

> respect to a particular group of businesses. If those businesses have a common characteristic, it is that their importance to the economic life of the community has been generally recognized as being so great as to warrant the community in according them monopoly status [which he admits is customarily accorded by a certificate of convenience and necessity] in exchange for the obligation to provide continuing service to all at reasonable rates. . . .

Aside from the Price Administrator's agreement that this attribute is part of the public utility parcel, there is an imposing amount of case authority in support.

In *Frost* v. *Corporation Commission*,[38] the Supreme Court listed a few familiar instances of businesses which are generally treated as public utilities. It did not include public warehouses, but it went on to say that those enumerated were merely "illustrations of a more comprehensive list" concerning which it stated:

> . . . it is difficult, upon any conceivable ground, to exclude a cotton gin, declared by statute to be a public utility, engaged in a public business, *the operation of which is precluded without a permit from a state governmental agency*, and which is subject to the same authority as that exercised over *transportation and transmission companies* in respect of rates, charges and regulations. Under these conditions, to engage in the business is not a matter of common right, but a privilege, the exercise of which, except in virtue of a public grant, would be in derogation of the state's power. Such a privilege, by every legitimate test, is a franchise. (Italics supplied)

In *Southern Ohio Power Co.* v. *Public Utilities Comm.*,[39] the Ohio Court, in denying an electric company public utility status, said:

> The Southern Ohio Power Company claims . . . that it has not at any time received any public franchise; and that it has never held itself out to the public as willing to serve the public generally; and that it never intended to nor did it in fact dedicate its property to public utility service . . .

In his dissent in *New State Ice Co.* v. *Liebmann*,[40] Justice Brandeis said flatly:

> If the business is, *or can be made*, a public utility, it *must be possible* to make the issue of a certificate a prerequisite to engaging in it. (Italics supplied)

The majority in the *New State Ice Co. case* in effect denied public utility status to an ice producing plant, declared by Oklahoma statute to be a public utility subject to license or permit from the Corporation Counsel of Oklahoma. The Court made it plain that it was the license or franchise feature of the Oklahoma law as applied to ice companies to which it objected. It did not feel that an ice company could be constitutionally subjected to such control because such

[38] 278 U. S. 515, 520.

[39] 110 Ohio St. 246, 143 N. E. 700, 701.

[40] 285 U. S. 262, 284.

an enterprise was "not the case of a *natural* monopoly, *or* of an enterprise *in its nature* dependent upon the grant of public privileges." (Italics supplied.) In the Nebbia case,[41] the Court excluded the milk industry from the public utility concept upon exactly the same basis, that is to say, that there was not present "any monopoly or monopolistic practice. It goes without saying that those engaged in the business are in no way dependent upon public grants or franchises for the privilege of conducting their activities."

In another Federal decision, *Publix Cleaners* v. *Florida Dry Cleaning and Laundry Board*,[42] involving the applicability of public utility regulation to a dry cleaning business, the public utility formula was promulgated in precisely the same disjunctive terms, *i.e.*, *either* that the business be a monopoly *or* that it be subject to a public grant or franchise.

> No one questions legislative authority, in the exercise of the police power, to fix prices for public utilities which render indispensible services, and enjoy in their business a monopoly *or* public grants or franchises, *and* which must serve all alike upon demand. The dry cleaning business is not a "public utility" in that sense. (Italics supplied.)

Besides being implicit in the duty to serve the public at fair and non-discriminatory rates, the right of the State to regulate, prescribe rates, and subject other operations of a public utility to varying supervisions is, although it is often not exercised, included within the greater right to exclude or to license. However, generally, all businesses affected with a public interest are subjected or are properly liable to subjection to some or all of these controls. The nature of the business, together with the economic evils peculiar thereto, are what determine the limits to which the State can go in this respect without contravening the rights involved in due process of law. The extent and variation of the innumerable controls imposed upon public utilities, however, is not germane to this determination. Judicial notice may be taken, however, of the fact that in many States there is an absence of various controls over certain public utilities. Delaware, for example, exercises no rate control whatever. This, however, and other instances of non-regulation, is a matter of local policy, and does not represent a want of power.

V. *Definitive Summary.*

I come out, therefore, in my partial promulgation of a public utility definition, with a composite formula, pieced together from an analysis of the judicial treatment in a fairly exhaustive review of the decisions. The quotations set forth herein reflect a unanimity of impression and understanding in both Federal and State judicial circles as to the considerations involved in the public utility concept. The definition was not stated in these opinions as upholding a classification made by statute, but as the lay and professional understanding and recognition of the term and what it involved.

This, then, is my exact position: If a business is (1) affected with a public interest; *and* (2) bears an intimate connection with the proc-

[41] 291 U. S. 502, 531.

[42] 32 F. Supp. 31, 34.

esses of transportation and distribution, *and* (3) is under an obligation to afford its facilities to the public generally, upon demand, at fair and non-discriminatory rates, *and* (4) enjoys, in a large measure an independence and freedom from business competition brought about either (a) by its acquirement of a monopolistic status, or (b) by the grant of a franchise or certificate from the State placing it in this position, it is for the purposes of the Price Control Act, as amended, a public utility, and subject to the exemption provisions of Section 302 (c).

It is these four attributes which make up the bundle or the public utility formula to the extent which I have promulgated it. The formula is a limited one. It is designed only to provide an absolute test or standard by which one may *affirmatively* determine that a particular business *is* a public utility. I do not wish to be misunderstood as indicating that a business possessed of or operating under less than the total of these features may not be considered a public utility. My formula has no negative or exclusive implications. What I do say is that, at least, *any* business which *does* possess and practice and operate under each and all of these features, is by a preponderance of considered judicial opinion a business in the public utility class. I feel that this supplies the natural significance and customary connotation which must be our guide in this controversy. Now, having cut the cloth of the contested concept, let us proceed to examine the attributes of the complainant's public warehouse and then determine whether or not it will fit the pattern.

VI. *The Statutory Regulation of the Complainant's Public Warehouse.*

The Constitution of California designates warehouses in which there is a public use to be public utilities and vests in the Legislature the authority to regulate all public utilities within the State.[43] Pursuant to these powers, the Legislature, in 1911, enacted the Public Utilities Act,[44] conferring the authorized power upon the Railroad Commission. The Act of 1911, however, did not include every warehouse within the definition of the terms "public utility", or within the regulations and controls set forth. Only those warehouses which serve the public generally, or any portion thereof, for compensation, were made public utilities and held to be subject to the controls stated. The term warehouse, as use in the Act, was expressly limited to

> . . . any building or structure in which property is regularly stored for compensation within this State, *in connection with or to facilitate the transportation of property by a common carrier or vessel*, or the loading or unloading of the same . . .[45] (Italics supplied)

This was supplemented in 1927 with

> . . . any building, or structure, or warehouse, in which merchandise, other than second-hand household goods or effects, and other than merchandise sold but retained in the custody of the vendor,

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[43] Art. IV, Sec. 33; Art. XII, Sec. 23.

[44] Enacted Stat. 1911 (Ex. Sess.) ch. 14.

[45] Sec. 2 (aa).

> is regularly stored for the public generally, for compensation, within this state, excepting warehouses conducted by any non profit, cooperative association or corporation which is engaged in the handling or marketing of the agricultural products of its members; . . .[46]

The California Act requires that such a public warehouse grant non-discriminatory and equal rates to everyone, giving the Railroad Commission the power to determine any question of fact relevant thereto.[47] The right to establish or operate a public warehouse of complainant's class is made subject to the complete authority of the Railroad Commission; a franchise in the nature of a certificate of public convenience and necessity is required to begin the operation of this business or to extend or expand existing facilities; and, the grant of this franchise may be refused by the Railroad Commission with or without a hearing, and, if granted, the Commission may attach to the right to engage in the business such terms and conditions as it deems the public convenience and necessity may require, or it may, at any time and for good cause, suspend, revoke, alter, or amend this right.[48]

In addition, the complainant is forbidden by the Act to alter any existing rate or charge without proper application to the Railroad Commission.[49] The Commission is empowered, either upon its own motion or upon complaint, to find that the warehouse rates are "unjust, unreasonable, discriminatory, or preferential." It may then determine the "just, reasonable, and sufficient" rate, and fix the same by order.[50] The Commission may also, upon its own motion or upon complaint, investigate a single charge, rate or rental of complainant's, or any schedule of its warehouse rates, and establish new prices, rentals, or charges in lieu thereof.[51]

Periodical reports are required to be furnished the Commission,[52] and there is other general supervision.[53] The Commission has the duty of investing all accidents occurring on complainant's premises.[54] It is empowered to institute safety regulations and to impose the use of certain appliances and equipment in complainant's storage operations.[55] Complainant is under serious restrictions as to merger or transfer of franchise, or the sale, lease, mortgaging, assignment, or incumbrance of its property, or any part thereof.[56] It cannot acquire any part of the capital stock of any other public utility,[57] and it must account to the Commission for the disposition of the proceeds of all sales of stocks.[58] And there are countless other regulations and re-

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46 Sec. 2-1/2, added 1927, ch. 878.
47 Sec. 19, Sec. 13 (a, b, c).
48 Sec. 50-1/2.
49 Sec. 15.
50 Sec. 32 (a).
51 Sec. 32 (b).
52 Sec. 29.
53 Sec. 31.
54 Sec. 44.
55 Sec. 35.
56 Sec. 51 (a).
57 Sec. 51 (b).
58 Sec. 52 (c).

strictions, the non-observance of which place complainant subject to serious fines and penalties.[59]

VII. *The Attributes of the Formula are present in the Complainant's Business.*

With cognizance of the complainant's statutory position, we proceed to determine whether the combination of attributes contained in our formula are present in its business.

(1) Business affected with a public interest.

Clearly, complainant's business is one affected with a public interest. *Munn* v. *Illinois*[60] determined this as to public warehouses. Nor can the absence of the term "public utility" in that decision in any wise be considered as an implied negation of the appropriateness of public utility controls over public warehouses. The term public utility was apparently not in vogue in that day, although its verbal constituents had been paired for other denotations[61] prior to the *Munn* case. There is evidence, however, in more recent Supreme Court decisions, that that Court has considered public warehouses to be in the public utility category. The *Munn* case has frequently been the only citation offered in support of a proposition of law relating to *public utility* regulation.[62]

(2) Relation to transportation and distribution.

It is not difficult to establish the intimate association between complainant's activities and the processes of transportation and distribution. The California Public Utility Act does not purport to deal with any but public warehouses, and it specifically excludes those public warehouses engaged in rendering services to second-hand household goods or effects, selling merchandise which is retained in the custody of the vendor, or handling the produce of agricultural cooperatives. This excludes a wide area of public warehouse activitiy. It reduces the types of public warehouses regulated, as I see it, to those whose activities bear an intimate relation to the processes of transportation and distribution. In Section 2 (aa), the only portion of the Public Utility Act containing a specifically affirmative statement relating to types of public warehouses included, the regulations are limited to those wherein "property is regularly stored for compensation ... *in connection with or to facilitate the transportation of property by a common carrier.* ..." (Italics supplied)

In its oral argument before us, complainant has urged that a public warehouse could not function properly without railroad facilities, that the *very nature* of the business required that it be so located as to receive prompt delivery by rail and so located in relation to the distribution area that it can give prompt delivery. Except insofar as it reflects a reciprocal reliance, however, our primary interest is not how

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[59] Sections 75, 76 (a, b), 81.

[60] 94 U. S. 113.

[61] Olmstead v. Camp, 33 Conn. 532, 546.

[62] Producers Trans. Co. v. Railroad Comm. of Calif., 251 U. S. 228, 231; Terminal Taxicab Co. v. District of Columbia, 241 U. S. 252, 254; also in, City of Phoenix v. Kasun, 54 Ariz. 470, 97 P. (2d) 211, 212.

dependent a public warehouse is upon railroad facilities, but rather how reliant are railroads and the general flow of commerce upon public warehouses.

Public warehouses, of the character involved in the present controversy, are in the very "throat" of commercial activity. Although they do not actually transport goods, they render an indispensible service "before the journey begins, when it ends, or along the way."[63] This intimate connection with the processes of transportation and distribution was the very reason that public warehouses were held to be devoted to a public use in the great case of *Munn* v. *Illinois*. There the Court, after describing the essential role of the particular public warehouse in the movements of grain in interstate commerce, stated:

> *The railways have found is impractical to own such elevators, and public policy forbids the transaction of such business by the carrier:* the ownership has, therefore, been by private individuals. .... Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, ... [etc.] ... pursues a public employment and exercises "a sort of public office," these plaintiffs in error do not. *They stand, ... in the very "gateway of commerce," and take toll*
> 7 *from all who pass.* Their business most certainly "tends to a common charge, and is become a thing of public interest and use." Every bushel of grain for its passage "pays a toll, which is a common charge," and, therefore, according to Lord Hale, every such warehouseman "ought to be under public regulation...." Certainly, if any business can be clothed "with a public interest, and cease to be *juris privati* only," this has been. It may not be made so by the operation of the Constitution of Illinois or this statute, *but it is by the facts.*[64] (Italies supplied)

In *Budd* v. *New York*,[65] the Supreme Court stated:

> ...the business of elevating grain is a business charged with a public interest, and those who carry it on occupy a relation to the community *analagous to that of common carriers.* The elevator owner, in fact, retains the grain in his custody for an appreciable period of time, because he receives it into his custody, weighs it, and then discharges it, and *his employment is thus analogous to that of a warehouseman.* (Italies supplied)

It seems, therefore, that a public warehouseman of the class involved holds himself out to serve the same general public as the railroad. The Price Administrator himself seems to have recognized this. In Amendment 1 to Supplementary Regulation No. 11[66] exempting certain commodities from price regulation, the Price Administrator included:

> (68) Transportation of commodities by persons offering their services to the general public as common carriers by rail, water, motor, pipe line, or other means of conveyances, rates charged for:

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[63] Lamar, J., Dissenting in German Alliance Ins. Co., v. Kansas, 233 U. S. 389, 436.

[64] 94 U. S. 113, 131, 132.

[65] 143 U. S. 517, 544.

[66] 7 F. R. 4738, 4739.

Provided, however, That charges for storage and warehousing and all other services incident thereto by any person shall not be excluded from the General Maximum Price Regulation.

At its least, this regulation reveals that the Price Administrator considered the services of certain warehouses to be so intimately associated with common carrier facilities as to consider and deal with the two together in enumerating a very extended list of commodities. Of greater relevancy, however, is the apparent fact that he expressly excluded warehouse services from an exemption relating to common carrier prices, lest the former, by natural implication, be considered to have been included with the latter. Needless to say, however, this effort of the Price Administrator cannot alter the natural significance of terms and meanings as employed by Congress.

Finally, I call attention to what I believe is an accurate equation in transportational proportion. Surely the vital position which the wharf occupies as regards water-borne commerce must be analogously accorded to the warehouse as regards railroad commerce. In this nation the quantity of railroad freight tonnage is many times that of water-borne commerce, and the public warehouse must be considered to have equalled if not surpassed the wharf in commercial importance. I think that it must be accorded a position commensurate with that achievement.

(3) Equal and reasonable service to the public upon demand.

In conformity with its statutory requirements, the complainant makes its storage facilities available to all who demand them at fair and equal rentals. The complete supervision and control over all aspects of this phase of the complainant's business has been described.

(4) The franchise feature.

Warehouses of complainant's class have been branded public utilities by the statutes of California, under proper constitutional authority. They have the imprimatur of the state. But more than a brand or label has been stamped. Warehouses of the complainant's class are dependent upon the grant of a certificate of public convenience and necessity. Moreover, the exercise of the right to engage in the business is subject to alteration, suspension, or revocation by the state, whose regulatory powers in this regard have been made very broad.

Both in statutory position and in actual operation we find the complainant's public warehouse to be clothed with each of the attributes comprising the public utility bundle, as set out in the limited formula promulgated.

In addition to possessing all the attributes in the four-pointed formula, however, complainant's rates are actually fixed by the Railroad Commission of California. Actual rate-fixing by the state, as distinguished from its unexercised right to fix rates, is a common, but by no means universal regulatory feature of a public utility. It is not one of the fundamental determinative attributes found to be present

almost without exception in the public utility bundle, but it is a frequent form of regulation or supervision applied to a public utility. There are other common regulatory features which are in this category (and which complainant possesses), such as an obligation to continue service, limitations upon stock transfers, restrictions upon the sale, leasing, transferring, or incumbrance of property, *et al.*

The actual fixing of rates by existing federal, state, and municipal agencies, however, was apparently relied upon heavily by Congress as a feature about public utilities generally which entitled them to be excluded from the supervision of the Price Administrator. Complainant has made much of this point, urging in particular that only those public utilities which were under the jurisdiction of existing rate regulatory bodies were intended by Congress to be included within the exemption.

The Congressional consideration of the Bill furnishes conflicting indications upon this score. Testifying before the House Banking and Currency Committee, Mr. Leon Henderson, later the first Price Administrator, made statements at several points regarding the exemption of public utilities:

(1) ... and public utilities were under what for the time being at least seemed to be an adequate system of State regulation, and therefore did not need to be brought into review. ...[67]

(2) ... Now, as to utilities. There is, as the members are aware, an adequate set of regulations as to the charges which utility companies can make. These, again, are based upon a long series of judicial determinations of State regulations and of State laws. It seemed to those drafting the bill that this was an area which was not likely to give difficulty or to cause, so far as they could see at that time, any inflationary trend. The bill is designed to control an emergency inflationary situation and has left them out, just as it has transportation rates. There are questions peculiar to utilities and none of them, so far as I see at the present time, would make necessary further regulation by means of a price-control bill.[68]

(3) ... I have found that everyone of the agencies charged with these particular items of cost (agencies of government in charge of public utility rates) are just as earnest as we are about keeping those costs down.[69]

(4) Mr. Patman.... I understood...that you were satisfied with the rate-making bodies in the States, and that that was the reason you did not ask that utility and transportation rates be included. Do I understand that correctly?

Mr. Henderson: I did not mean to limit it to existing regulatory mechanisms both in transportation and utilities. What I said was that the transportation rates themselves were already under regulation by Federal and State agencies,

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[67] Page 444 of exerpts from transcript of hearings before the Committee on Banking and Currency of the House of Representatives, Revised Part 1, held on August 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, and September 17, 18, 22, 23, and 25, 1941.

[68] Pp. 54, 55, *id.*

[69] Page 445, *id.*

> and I also feel that this is not an item, even in the absence of that regulation, to be brought under commodity price regulation.[70]

Congressman Steagall, Chairman of the House Banking and Currency Committee and the sponsor of the bill on the floor of the House, made the following statement:

> The bill also provides explicitly in Section 302(c) that nothing in the act is to be construed to authorize . . . the regulation of rates charged by any common carrier, or other public utility, which are *usually* subject to adequate control by State or other Federal agencies.[71] (Italics supplied)

The Amendments to the Price Control Act of October 2, 1942,[72] and the legislative discussion pertinent thereto lend some support to the complainant's position. Senator Norris had urged an amendment which would have placed limitations upon increases in public utility rates above the September 15, 1942 level.[73] From the Senate floor, he described the effect of the then existing law as follows:

> In the act creating the Office of Price Administration we specifically *excluded* from his *control all regulation of public utility rates*, such as telephone, gas, water, and electric rates, street car fares, *and so forth*. It was natural that such an exclusion should be made because the regulation of *all such rates* is provided for and controlled by various boards and commissions.[74] (Italics supplied)

The Norris amendment was rejected in conference. The conference report, however, contained certain language, referred to by Senator Brown as a substitute for the Norris proposal,[75] which reads as follows:

> *Provided*, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agencies as he may designate, and consents to the timely intervention by such agency before the Federal, State or municipal authority having jurisdiction to consider such increase.[76]

From the testimony before the Committee and the amendment agreed upon in conference, it is clear that Congress was giving substantial consideration to the existence of rate controlling agencies for public utility enterprises. Perhaps this was the moving consideration for their exemption. Certainly complainant's is a logical position to advance, in view of this testimony, and in view of the purposes of the Price Control Act. Because the complainant's rates are in fact sub-

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70 Page 626, *id.*

71 Vol. 87, No. 209, p. 9308, Cong. Record (Nov. 24, 1941).

72 October 2, 1942, c. 578, Sec. 1; 56 Stat. —, 50 U.S.C.A. (App) 961, *et seq.*

73 H. R. 7565.

74 Vol. 88, No. 155, pp. 7343-7346, Cong. Record (Sept. 10, 1942).

75 Vol. 88, No. 168, pp. 7970, 7971, Cong. Record (Oct. 2, 1942).

76 56 Stat. —, 50 U. S. C. A. (App) 961.

ject to complete controls by the Railroad Commission of California, however, I do not feel that it is proper or necessary for us, in the circumstances, to make a gratuitous determination as to whether existing rate control by some governmental body was made the pivotal factor in the exemption of a particular public utility. Since complainant, therefore, besides bearing all the burdens of the "bundle" of which I have spoken, has its rates fixed by an existing regulatory commission, it is not only a public utility within the virtually universal significance of the term, but it is a public utility which is operated and controlled in the manner which, it appears, may have influenced Congress to exempt the class, "public utilities" in general.

VIII. *Sundry contentions and arguments of the parties.*

The complainant has argued that Congress intended that the term public utility be construed as applied by federal, state, or local regulation. It feels that all businesses designated as a public utility by a particular law were intended to be exempted by Congress in its use of the term. The concept, public utility, is, however, more than a label. I have previously denominated it as a bundle of characteristics, enumerating the principle structural components. The state legislatures have been too generous with the use of the term to allow the assumption that Congress intended the complainant's superficial standard to govern. The use of the term by some of the states has, as Judge Maris has said, been so far broadened that in one of them, to cite an extreme case, it is defined to include "every corporation, or person now or hereafter declared by law to be affected with a public interest . . . ."[77]

I feel that Congress intended greater uniformity and more extensive control by the Price Administrator than to allow a name or a label, as applied by another governmental body, to thwart its anti-inflationary efforts. There are far firmer standards to adopt, and we cannot stop at the skin of a legislative designation of a business as a "public utility." We are obliged to indulge in some subcutaneous delving. It is characteristics and not names that control. For instance, the question: "Is a storage house or a warehouse a public utility?" is as insusceptible of an answer as is the question: "Is a vehicle which transports human beings a common carrier?" When the latter is posed, questions are asked, *characteristics and attributes are sought.* So it must be in the consideration of a public warehouse as a public utility.

The Price Administrator for his part has contended that a warehouse is a warehouse, and that if we hold complainant's business exempt, all public warehouses in all states would be exempt, however limited the controls they are under, because it cannot be considered the Congressional intent to exempt a certain kind of business in one state, and to include the *same* business in another state depending upon the existence and scope of local regulation. He argues that there must be uniformity throughout the states in the application of the Price Act.

Again—the fault in this argument lies in failing to treat public utility as a bundle of attributes. Businesses are not "the same"

[77] Colorado, Stat. Ann. (1935) ch. 137, Sec. 3. See also Dunagan v. Town of Red Rock, 58 Okl. 218, 158 Pac. 1170, 1172.

merely because they turn out the same product or handle the same commodity or facility. It is a false uniformity, indeed, that would be founded by looking only at the end product. It is far more than what a business offers for sale which determines its status as a public utility. The Price Administrator has criticized the complainant's contention that the state label should apply as promoting non-uniformity and irregularity, but the substitute scale which he submits seeks a similarly superficial standard. I am not forcing all warehouses into a single category. The realistic, analytic appraisal afforded by the formula I provide assures that an equitable and reasonable standard will be applied in the consideration of any particular warehouse. The nature of the business, how it is operated, and how it is regulated, rather than what it is labeled and what product it sells will be determinative. I am cognizant that there must be uniformity throughout the states in the application of a Federal law; this is a familiar principle of Federal statutory construction.[78] I believe, however, that uniformity cannot be achieved but by considering attributes, controls, obligations and method of operation.

The Price Administrator did not apply his so-called "uniformity" rule in issuing regulations under the Price Act. Therein public utilities are exempted from regulation. In Supplementary Regulation No. 11, Amendment No. 1, however, in exempting certain enterprises from price regulation, the Price Administrator included gas, electric, water, *et al.*, companies furnishing or supplying "*as public utilities.*" (Italics supplied) Clearly, however, if all companies producing gas, electricity, and water were public utilities, the quoted appendage to the exemption is superfluous. It is a well known fact that there are many companies furnishing these facilities which are not public utilities,[79] and any attempt to treat them as such would be in derogation of due process.[80] Some of them are public utilities, and some of them are not, all depending upon how they are organized and operated. One will be burdened with the essential characteristics of which I have spoken. Another will not be. One will be subject to the controls of the Price Administrator, the other will not be subject. So it is, and must be, with public warehouses.

The New Hampshire decision of *State* v. *Frost*,[81] is illustrative of the disposition of the courts in considering whether a particular business is a public utility, to regard not the commodity involved, but the extent of the obligations to the public and the manner of service required. The case is of especial value because it deals with public warehouses. A New Hampshire statute defined a public warehouseman to be anyone "who keeps and maintains a warehouse for the storage of goods, wares and merchandise." Referring to this statute, the Court said:

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[78] Lyeth v. Hoey, 305 U. S. 188, 194.

[79] Depauw University v. Public Service Comm. of Oregon, 253 Fed. 848; Allen v. Railroad Comm. of Calif., 179 Cal. 68, 175 Pac. 466, cert. denied 249 U. S. 601; Cawker v. Meyer, 147 Wis. 320, 133 N. W. 157; Southern Ohio Power Co. v. Public Utilities Comm. of Ohio, 110 Ohio St. 246, 143 N. E. 700.

[80] New State Ice Co. v. Liebmann, 285 U. S. 262, 284, 302; Producers Transportation Co. v. Railroad Comm. of Calif., 251 U. S. 228, 230; Tyson & Brother v. Banton, 273 U. S. 418, 431; Wolff Co. v. Industrial Court, 262 U. S. 522, 536; Associated Pipe Line Co. v. Railroad Comm., 176 Cal. 518, 169 Pac. 62, 66; State v. Barnes, 22 Okl. 191, 97 Pac. 997.

[81] —— New Hamp. ——, 17 A. (2d) 441.

> The recital that such a person shall be a "public" warehouseman seems a superfluous and meaningless designation. It is not intended that the business shall be a public utility with obligation to serve all who come for reasonable charges and without discrimination. Regulation is limited to that specifically prescribed [provisions for the negotiability of warehouse receipts], and there would be no lessened regulation if the designation were omitted.[82]

The Price Administrator has also urged that Congress could not have intended to include warehouses in the exemption clause as a public utility because the *majority* of states have not denominated them as such. He submits statistics which show that only three states[83] have included all types of public warehouses in the statutory definition of public utility, and that in only eight other states[84] have particular types of warehouses been so designated. I have already indicated that we should be unimpressed with mere labels. The imprimatur of the state is worthy of passing notice, it may serve as a starting point for inquiry, but it hardly touches the more pertinent problems involved. On the other hand, respondent's statistics are germane and informing, insofar as they reveal the extent to which the eleven states concerned regulate their so-called public utility warehouses. Respondent says each warehouse designated as a public utility is under an obligation to serve the public at large without discrimination. All are dependent upon state permission to engage in the business. In six instances a certificate of public convenience and necessity is required;[85] in the remaining five, licenses must be secured.[86] In the eight states which designate only particular types of warehouses "public utilities", a division is made upon the basis of warehouses used in connection with a common carrier[87] or warehouses storing important agricultural commodities[88] which enjoy a nation-wide market. Furthermore, in each of the 48 states public warehouses are subject to some regulatory agency, and in sixteen states that agency is a *Public Utility Commission*.

Although, as I have said, I do not feel it necessary that a warehouse or any other business enterprise be possessed of all of these attributes in order to be considered a public utility, it is nevertheless instructive to note that the eleven states, which have so denominated public warehouses, appear, almost without exception, to have imposed *all* of the attributes which are included within the four-pointed formula. If the other thirty-seven states have not as yet seen fit to impose, in substantial measure, corresponding duties and regulations upon their public warehouses, then, I feel, it is perhaps proper that the latter have not been designated public utilities in those states.

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82 —— New Hamp. ——, 17 A (2d) 441, 443.

83 California (The California Statute, as we have seen, does not pretend to be as broad as respondent claims), Indiana, and South Dakota.

84 Arizona (cotton and wool), Idaho (used in connection with a common carrier), Illinois (grain), Maine (used in connection with a common carrier), Nevada (used in connection with a common carrier), North Dakota (agricultural products), Utah (grain in connection with a common carrier), Washington (used in connection with transportation by water).

85 California, Idaho, Maine, Nevada, Utah, and Washington.

86 Indiana, Arizona, South Dakota, Illinois, and North Dakota.

87 See footnote 82, *supra*.

88 See footnote 82, *supra*.

Respondent, however, points out that in only three states[89] are types of warehouse *rates* determined by a rate-fixing agency, and th in only twenty-four additional states[90] are some types of warehou so regulated. He contrasts this with the high majority of states termining the rates and charges of gas, water, electricity, telepho and telegraph companies, etc. He concludes that a public warehou simply isn't one of the familiar, traditional enterprises that is co sidered and treated as a public utility, and that, therefore, Congre could not have had it in mind in exempting that class of enterpri from price control.

Complainant has countered with other statistics indicating th four states fix the rates of all types of warehouses,[91] that five stat fix the rates of warehouses used in connection with common carriers or railroads,[93] and that twelve other states fix the rates of warehou storing important agricultural products.[94]

It is not necessary to iron out the inconsistencies between the conflicting sets of statistics. Rate fixing by the state is not an accep able criterion for determining whether or not a business is a publ utility. I have hereinbefore stated that, although Congress may hav intended to make it the pivotal factor as to whether or not *a particula public utility should be exempted* under Section 302 (c), I do not co sider that *actual* imposition of rate control is necessary to *constitut* a business a public utility. Because the majority of states have no as of this date, considered it advisable to fix public warehouse rate does not mean that, when they feel the public interest demands i they will fail to impose appropriate regulations. Failure to act o to exercise a power is not to be confused with want of power. A though considerations of policy may stay its hand, the power of th state to control the rates of a public utility is clear. The submitte statistics, therefore, do not solve our problem. A counting of nose as to the states regulating the rates of a particular business is not th proper test, and certainly not a conclusive test.

Admittedly, some businesses, such as public gas and electric com panies, are regulated as public utilities more prevalently than othe kinds of enterprises, and, of course, it is a matter of more genera information that these businesses are so controlled. The extent t which a business has been subjected to public utility regulation, how ever, or the general knowledge as to that control, clearly does no affect the question.

My brothers who stand for affirmance have said that we must tak the term "public utility" in its "natural and ordinary meaning." They also appear to agree with the conclusions which I have reache as to that natural and ordinary meaning. They seek, however, t deny the appropriateness of that meaning in the case at bar, saying that in this particular act Congress employed a meaning which is

[89] California, S. Dakota, and Texas.

[90] Arkansas, Georgia, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Minnesota, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming.

[91] California, Indiana, Minnesota, and North Dakota.

[92] Idaho, Maine, and Utah.

[93] Georgia and Texas.

[94] Arkansas, Illinois, Iowa, Kansas, Missouri, Nebraska, North Carolina, Oklahoma, Oregon, South Dakota, Washington and Wisconsin.

narrower than the usual usage. They urge that the term was used in the Price Act to include only those familiar and traditional public utilities—"garden variety" stock, as Judge Magruder says. But those who assert a special meaning are charged with its proof. In the absence of a definite showing of the limited meaning, the natural and ordinary connotation must prevail. Any limitation must be delucible as a clear and ready inference from the Congressional language. I have looked in vain for such language.

It is true that the courts have given weight to an intervening administrative interpretation which has been the subject of considerable practice and tacit approbation. I do not feel, however, that it may be fairly said that the regulation, upon which the majority relies, imputes notice to Congress. The statement that warehouses and storage are to be considered subject to the General Maximum Price Regulation serves no indication that the Price Administrator did not consider such regulation subordinate to the provision of the Price Act exempting "public utilities" from regulation, and that he did not intend to exempt those warehouses which were so treated. The reliance upon such an interpretation begs the question which we are here called upon to decide, as I see it. At any rate, it can hardly be expected that Congress, as a whole, would be acquainted with the prodigal detail of the Price Administrator's orders and regulations, and particularly with an interpretation which was hidden in the recesses of a proviso to the 68th item of an order amending a supplementary regulation to an original order, which was of three and a half months' duration and had not been interpreted by this Court.

If Congress passed a law restricting the importation of all animals, would it be considered that the law was not applicable to a wou-wou because such is not generally known as an existing animal, and thus not an animal which Congress had in mind in passing the act? I feel that if Congress had intended, as the Price Administrator contends, to limit the exemption in question to a few of the more familiar businesses regulated as public utilities, it would have specifically enumerated those few intended. But the fact that the great majority of the states may not have imposed an obligation upon all warehouses to operate as public utilities cannot affect the fact that in some states certain public warehouses have been so constituted.

Often an enterprise may be one peculiar to only a particular region of the nation, *e. g.*, wheat elevators or cotton gins. By the Price Administrator's standard, however, these could not be considered public utilities because only a minority of the states may treat them as such. A few illustrations of the judicial treatment of a business after the imposition of public utility attributes thereupon, will serve to show this contention untenable.

In the Packers and Stockyards Act,[95] for example, it is provided that no one may "carry on the business of a market agency or dealer" at certain types of public stockyards unless registered with the Secretary of Agriculture, under the rules and regulations which the latter prescribed.[96] The Act forbids certain unfair practices in the industry. Stockyards are required to maintain equal service for all at equal rates,[97] and these rates and charges are subjected to regula-

[95] Aug. 15, 1921, c. 64, 42 Stat. 159; 7 U. S. C. A. 181 *et seq.*

[96] 42 Stat. 163, 7 U. S. C. A. 203.

[97] 42 Stat. 164, 7 U. S. C. A. 205; 42 Stat. 161, 7 U. S. C. A. 192 (b).

tion and control by the Secretary.[98] The transactions subject to the Secretary's supervision are stated to be those in the customary "current of commerce" as regards meat products "sent from one State with the expectation that they will end their transit, after purchase, in another. . . ."[99] In *Stafford* v. *Wallace*,[100] the Supreme Court attributed the following effect to this Act:

> The Act . . . treats the various stockyards of the country as great national public utilities. . . . It assumes that they conduct a business affected by a public use of a national character and subject to national regulation.

This designation has been reaffirmed and the stockyards definitely termed public utilities in recent decisions.[101]

In *Frost* v. *Corporation Commission*,[102] the Supreme Court upheld an Oklahoma statute making certain types of cotton gins public utilities and requiring one entering the business to acquire a license or franchise from the state.[103] Neither stockyards nor cotton gins are considered familiar, "traditional" public utilities. They are not "garden variety" stock. When, however, those engaged in these businesses in a particular area had been compelled to run their activities in a certain way, had had certain obligations imposed upon them by the state, and had been required to render certain services to the public generally, the Supreme Court was not hesitant in conceding full membership in the public utility family to *the particular businesses so treated*.

A highway tunnel company is certainly not a familiar "traditional" public utility. It grows in very few gardens. In *Parsons* v. *Detroit & Canada Tunnel Company*,[104] however, the Federal court in holding such a company to be a public utility said:

> The defendant tunnel company is properly incorporated under the General Corporation Act of Michigan, so called, under which many other public utilities are required to be incorporated. Railroad companies and railroad tunnel companies (as distinguished from highway tunnel companies such as the defendant) are required to incorporate under special acts. There is no special Michigan law under which all public utilities are required to incorporate, and *the Legislature has not defined public utilities*. Under these circumstances, the fact that the defendant company is organized under the act governing the organization of general business corporations is no indication, as contended by the respondents, that the property and business of the company is not properly classified as a public utility. Section 3555 of Michigan Compiled Laws of 1929 requires the property of certain rail carriers and of telephone and telegraph companies to be assessed by the

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[98] 42 Stat. 165 et seq., 7 U. S. C. A. 208 *et seq.*

[99] 42 Stat. 159, 7 U. S. C. A. 183.

[100] 258 U. S. 495, 516.

[101] Swift & Co. v. United States, 316 U. S. 216, 232; Atchison Ry. v. United States, 295 U. S. 193, 201.

[102] 278 U. S. 515. See also Chickasha Cotton Oil Co. v. Cotton County Gin Co., 40 F. (2d) 846 (C. C. A. 10th).

[103] Compiled Stat. of Oklahoma (1921), Sec. 3712.

[104] 15 F. Supp. 986, 997.

Michigan state tax commission and a specific tax paid thereon in lieu of other taxes. *Highway tunnel companies and many other public utility companies are not included.* This is no indication that the business and property of the defendant company is not properly classified as a public utility; there being nothing in the language of the statutes to indicate that a company cannot be considered a public utility unless it is included therein. *The purpose and nature of its business and devotion of its property to the public use under the circumstances involved, and not the statute under which it is incorporated or described for purposes of taxation, determines whether or not it is a public utility.* 51 C. J. 5. (Italics supplied)

Respondent has expressed a fear that such an interpretation will render the controls of the Price Administrator subject to being defeated because any enterprise may be put beyond his reach by being designated a public utility by the states. This argument has no weight, however, for in addition to statutory designation there must be the public utility characteristics, and the states are clearly limited in their right to control a business as a public utility. The limitations of due process are always applicable.[105] The case of *New State Ice Co. v. Liebmann*,[106] illustrates the attitude of the courts in limiting the power of the states to create public utilities. The Supreme Court of California, itself, has recognized this limitation, announcing that the courts will not sustain the imposition of public utility control upon any enterprise which is not of the proper character.[107]

The respondent argues that the definition of "commodity" in Section 302 (c) to include services rendered "in connection with the processing, *distribution, storage*, . . . of a commodity" (Italics supplied) expressly includes warehouses. But complainant has aptly pointed out that if this be so, railroads would also be included in the Price Administrator's control as they engage in the business of "distribution" of commodities. It is true that certain storage facilities are subject to the controls of the Price Administrator, but when a storage enterprise is conducted as a public utility, it falls within the provided exemption, which is dominant and controlling.

Allusion has been made to certain dictionary and encyclopaedic definitions wherein lists of public utilities have been formulated and in which warehouses have not been specifically included.[108] Other authoritative references have included warehouses,[109] but I think it will suffice to say, here, that those definitions wherein the term has been excluded either do not purport to be complete (often no more

[105] New State Ice Co. v. Liebmann, 285 U. S. 262, 284, 285, 307; Producers Transportation Co. v. Railroad Commission of the State of California, 251 U. S. 228, 230.

[106] 285 U. S. 262.

[107] Associated Pipe Line Co. v. Railroad Commission of California, 176 Cal. 518, 169 Pac. 62, 66.

[108] Compton's Pictured Encyclopaedia (1942) Vol. 11, p. 364; Moody's Public Utilities Index, April 10, 1943; New International Encyclopaedia (1930) Vol. 19, p. 347.

[109] Nelson's Perpetual Loose Leaf Encyclopaedia, Vol. X, p. 91A; Encyclopaedia Americana, Vol. 22, pp. 778-779; National Encyclopaedia (1942) Vol. 8, p. 301.

than three or four examples are listed), or, when the list is extended, the elementary construction rule of *ejusdem generis* is applicable.

Finally I might add that certain statements in the respondent's brief come close to committing him to an agreement that complainant's warehouse should be regarded as a public utility. Respondent admits that "certificates of public convenience and necessity are the customary device by which monopolistic status is accorded and protected." He further admits that monopolistic status together with the duty to serve the public upon demand at reasonable and non-discriminatory rates is the one common characteristic (if there be such) of a public utility. This is a substantial admission in view of the fact that respondent cannot, and indeed does not attempt to, deny that complainant operates under such a certificate and that it is under an obligation to serve the public in the manner described.

IX. *Conclusion*

I feel that it has been demonstrated that complainant's public warehouse is a business which is (1) affected with a public interest, *and* (2) bears an intimate connection with the processes of transportation and distribution, *and* (3) is under an obligation to afford its facilities to the public generally, upon demand, at fair and non-discriminatory rates, *and* (4) enjoys in a large measure an independence and freedom from economic competition brought about by the grant of a franchise from the state placing it in this position. In addition complainant has its rates fixed by an agency of the state, and it possesses many other customarily incidental features of public utilities.

Under these circumstances, complainant must be considered a public utility within the virtually universal significance of the term, and, thus, included within the meaning of the term as employed in the Price Act of 1942. Consequently it should be held that complainant is entitled to the exemption as provided in Section 302 (c), and that the General Maximum Price Regulation, Supplementary Regulation No. 11, and Amendment No. 1 thereto be set aside insofar as they purport to affect the complainant's charges concerned.

[fol. 147] UNITED STATES EMERGENCY COURT OF APPEALS

No. 5

DAVIES WAREHOUSE COMPANY, a Corporation, Complainant,

v.

PRENTISS M. BROWN, Price Administrator, Respondent

JUDGMENT

This Cause came on to be heard on the Complaint and Answer and on the Transcript of Proceedings before the Price Administrator, Office of Price Administration, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the Complaint herein be, and it is hereby, dismissed.

It Is Further Ordered that the Clerk of this Court transmit forthwith a certified copy of this Judgment to the Price Administrator.

Dated May 28th, 1943.

[fol. 148] WESTERN UNION

FA 448—108 NL—K San Francisco Calif 9

1943 Jun 10 AM 2 14

Hon Paul L Kelley, Clerk

United States Emergency Court of Appeals Wash D C—

Pursuant to provisisions of paragraph 7 of rule 38 of revised rules of United States Supreme Court, would you please certify ten copies transcript of record in Docket No. 5 Davies Warehouse Company versus Brown to clerk of that court consisting of the following: First complaint second answer third transcript of proceedings before the price administrator fourth opinion of the court dated May 28 consisting of separate opinions by Judge Maris Judge Magruder and Chief Judge Vinson and fifth judgment order dated May 28 dismissing complaint Stop Please ask assistant clerk Cullinan to telephone me Exbrook 1423 collect the minute record is received in his office Thanks and regards.

Reginald L. Vaughan.

7 28 5 28 28 1423.

[fol. 149] UNITED STATES EMERGENCY COURT OF APPEALS

I, Paul L. Kelley, Clerk of the United States Emergency Court of Appeals, hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 148, both inclusive, constitute a true copy of

(1) Complaint
(2) Answer of Respondent
(3) Transcript of Proceedings before the Price Administrator
(4) Proceedings in the United States Emergency Court of Appeals
(5) Designation of Record to be certified by Counsel for the Complainant,

in the case of Davies Warehouse Company, a Corporation, Complainant, v. Prentiss M. Brown, Price Administrator, Respondent, No. 5, as the same remain upon the files and records of said United States Emergency Court of Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Emergency Court of Appeals, at the City of Washington, this tenty day of June, A. D., 1943.

Paul L. Kelley, Clerk United States Emergency Court of Appeals. (Seal.)

[fol. 150] UNITED STATES EMERGENCY COURT OF APPEALS

No. 5

DAVIES WAREHOUSE COMPANY, a Corporation, Complainant,

v.

LEON HENDERSON, Price Administrator, Respondent

ORDER

The Complaint having suggested the resignation of Leon Henderson as Price Administrator and the appointment and qualification of Prentiss M. Brown as Price Administrator, and having moved to substitute Prentiss M. Brown, Price Administrator, as Respondent herein in lieu of Leon Henderson, Price Administrator, and the Court being advised, it is

Ordered by the Court that Prentiss M. Brown, Price Administrator be, and he is hereby, substituted as Respondent in the above entitled cause.

I, Paul L. Kelley, Clerk of the United States Emergency Court of Appeals, do hereby certify that the foregoing is a true copy of an Order entered by the Court in the above entitled cause on January 25, 1943, as the same appears upon the records and files of the said United States Emergency Court of Appeals.

In Testimony Whereof, I hereto set my hand and affix the seal of the said United States Emergency Court of Appeals at the City of Washington, this tenth day of June, A. D., 1943.

Paul L. Kelley, Clerk, United States Emergency Court of Appeals, by Amelia Woods, Deputy Clerk. (Seal.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1943

The petition herein for a writ of certiorari to the United States Emergency Court of Appeals is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office
JUN
CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 112

DAVIES WAREHOUSE COMPANY, a corporation,
Petitioner,

vs.

PRENTISS M. BROWN, Price Administrator,
Respondent.

Petition for a Writ of Certiorari to the United States Emergency Court of Appeals

REGINALD L. VAUGHAN,
Counsel for Petitioner.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

Subject Index

	Page
Summary and Short Statement of the Matter Involved	1
Opinion of the Court Below	6
Jurisdiction	7
Statutes Involved	7
Questions Presented	8
Reasons Relied on for the Allowance of the Writ	9
Conclusion	10

Statutes Cited

Pages

Emergency Price Control Act of 1942; Act Jan. 30, 1942, C. 26; 56 Stat. 23; 50 U.S.C.A. App. §§901 et seq. 2, 7

Section 204(d); Act Jan. 30, 1942, C. 26, Title II, §204(d), 56 Stat. 31, 50 U.S.C.A. App., Section 924(d) 7

Section 302(c); Act Jan. 30, 1942, C. 26, Title III, §302(c), 56 Stat. 36; 50 U.S.C.A. App., Section 942(c) 3, 7, 9

Section 302(c)(2); Act Jan. 30, 1942, C. 26, Title III, §302(c)(2), 56 Stat. 36; 50 U.S.C.A. App., §942(c)(2) 3, 5, 7, 8, 9

Inflation Control Act of 1942; Act Oct. 2, 1942, C. 578, 56 Stat. ....; 50 U.S.C.A. App. §§961 et seq. 5, 8

Section 1; Act Oct. 2, 1942, C. 578, §1, 56 Stat. ....; 50 U.S.C.A. App. §961 ..... 5, 8, 9

Judicial Code, Section 240, U.S.C. 1934 edition, Title 28, §347 7

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 112

DAVIES WAREHOUSE COMPANY, a corporation,
Petitioner,

vs.

PRENTISS M. BROWN, Price Administrator,
Respondent.

Petition for a Writ of Certiorari to the United States Emergency Court of Appeals

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Davies Warehouse Company, prays that a writ of certiorari issue to review the judgment and order of the United States Emergency Court of Appeals entered in the above case on May 28, 1943, dismissing the complaint brought by petitioner against the respondent, Price Administrator.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

The complaint of petitioner (R. 1) was filed with the United States Emergency Court of Appeals on August 25,

1942, for the purpose of determining whether or not the respondent, Price Administrator, has the authority to regulate the rates charged by petitioner and other public warehousemen in the State of California for storage and warehousing and all services incident thereto which they render to the general public as public utilities under the laws of that State.

Petitioner conducts the business of a public warehouseman in the City of Los Angeles, California. Both the constitutional and statutory laws of the State of California expressly declare this particular class of business to be that of a public utility. By the same law, all public utilities are placed under the jurisdiction and control of a regulatory body designated as the Railroad Commission of the State of California. Also, by the same law, the duty is imposed and the power is conferred upon that Commission to fix all rates which may be charged by such public utilities for commodities furnished or services rendered by them.

These laws definitely prescribe that a public utility warehouseman is under an obligation to afford its facilities upon demand to all members of the public alike at fair and non-discriminatory rates and, further, that no warehouseman may directly or indirectly increase any rate or charge, under any circumstances whatsoever, except upon a showing before the Railroad Commission and a finding by that Commission that such increase is justified.

On April 28, 1942, the respondent, acting under the authority conferred upon him by the Emergency Price Control Act of 1942[1] (hereinafter referred to as the Price

Act) issued The General Maximum Price Regulation (R. 46) which fixed as a seller's maximum price for any commodity furnished or service rendered the highest price charged by him during the month of March, 1942. Section 30 of that Regulation, as amended (R. 59), provided that it would not apply to such services as might be specified by supplementary regulations or amendments thereto.

Section 302(c)(2)[2] of the Price Act provides as follows:

> "As used in this Act—
>
> * * * * * * *
>
> (c) The term 'commodity' means commodities, articles, products, and materials (except materials furnished for publication by any press association or feature service, books, magazines, motion pictures, periodicals and newspapers, other than as waste or scrap), and it also includes services rendered otherwise than as an employee in connection with the processing, distribution, storage, installation, repair, or negotiation of purchases or sales of a commodity, or in connection with the operation of any service establishment for the servicing of a commodity: Provided, That nothing in this Act shall be construed to authorize the regulation of * * * (2) rates charged by any common carrier or other public utility * * *"

On June 16, 1942, respondent issued Supplementary Regulation No. 11 by which it was declared that The General Maximum Price Regulation would not apply to certain services until July 1, 1942, and under the services

1. Act January 30, 1942, C. 26, 56 Stat. 23; 50 U.S.C.A. App. §§901 et seq.

2. Act. Jan. 30, 1942, C. 26, Title III, §302(c)(2), 56 Stat. 36; 50 U.S.C.A. App. §942(c)(2).

thus treated were "(2) Commercial storage and warehousing and services incident thereto". (R. 97)

On June 23, 1942, respondent issued Amendment No. 1 to said Supplementary Regulation No. 11 (effective July 1, 1942), providing for the exception of certain services from the operation of The General Maximum Price Regulation. (R. 101) The only common carrier or public utility services which were specifically declared to be exempt by the respondent, Price Administrator, were the following:

> "(21) *Electricity* (companies furnishing, as public utilities), rates charged by (R. 102); * * * (25) *Express companies and freight forwarders* offering their services to the general public as common-carriers, rates charged by (R. 102); * * * (30) *Gas* (companies supplying, as public utilities through mains), rates charged by (R. 103); * * * (38) *Light, heat, or power* (companies furnishing, as public utilities), rates charged by (R. 103); * * * (61) *Telephone* services, rates charged for (R. 104); (62) *Telegraph* service, rates charged for (R. 104); * * * (68) *Transportation of commodities by persons offering their services to the general public as common carriers by rail, water, motor, pipe line, or other means of conveyances*, rates charged for; Provided, however, that charges for storage and warehousing and all other services incident thereto by any person shall not be excluded from the General Maximum Price Regulation. (R. 104); (69) *Transportation of persons*, rates charged for (R. 104); * * * (73) *Water* (companies supplying, to urban areas as public utilities), rates charged by." (R. 105)

Asserting itself to be a public utility within the meaning of the exemption of "any common carrier or other

public utility" set forth in Section 302(c)(2) of the Price Act and therefore aggrieved by the failure of the respondent to exempt its business from The General Maximum Price Regulation, petitioner filed a timely protest with the respondent, Price Administrator (R. 15); the Price Administrator denied the protest (R. 41) and petitioner filed its complaint with the Emergency Court of Appeals (R. 1), asking that court to set aside The General Maximum Price Regulation, said Supplementary Regulation No. 11 and said Amendment No. 1 to said Supplementary Regulation No. 11, insofar as they, and each of them, purport to regulate the rates and charges of petitioner and other public warehousemen in California for public utility storage and warehousing and all services incident thereto. (R. 12)

The theory of respondent in denying the said protest (R. 42) (which he urged before the Emergency Court of Appeals) is that the words "any common carrier or other public utility" as used in the exemption clause of Section 302(c)(2) of the Price Act includes only the so-called traditional utilities and, upon this theory has, by said Amendment No. 1 to Supplementary Regulation No. 11, exempted only the classes of common carriers and public utilities hereinabove mentioned.

Petitioner, on the other hand, contends that the exemption clause in question, as amended by the proviso of Section 1 of the Inflation Control Act of 1942[3] (hereinafter

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3. Act Oct 2, 1942, C. 578, 56 Stat. ____; 50 U.S.C.A. App. §§961 et seq. Section 1 of the Inflation Control Act (Act Oct. 2, 1942, C. 578, §1, 56 Stat. ____; 50 U.S.C.A. App. §961) reads as follows:

"In order to aid in the effective prosecution of the war, the President is authorized and directed, on or before No-

referred to as the Inflation Act) shows a clear Congressional intent to exempt only those classes of common carriers or other public utilities which are under adequate rate regulation by some Federal, State or Municipal authority other than the Office of Price Administration.

Petitioner further contends that even if respondent's theory (that only traditional utilities were intended to be exempted) were correct, petitioner is entitled to exemption, for the reason that public utility warehousemen are just as traditional as are the other classes of public utilities or common carriers which have been exempted under that theory.

OPINION OF THE COURT BELOW

The Emergency Court of Appeals entered its judgment order on May 28, 1943, dismissing the complaint, pursuant to the majority opinion written by Judge Albert B. Maris, concurred in by Judge Calvert Magruder with a dissenting

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vember 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: *Provided, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase.*" (Emphasis supplied.)

opinion by Chief Judge Fred M. Vinson. These opinions are not yet officially reported. Copies thereof are set forth at length in the record (R. 109 et seq.).

JURISDICTION.

The jurisdiction of this Court is invoked under Section 204(d) of the Price Act,[4] which provides that a petition for a writ of certiorari may be filed in this Court within thirty days after entry of a judgment or order by the Emergency Court of Appeals and that thereupon the judgment or order shall be subject to review by this Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended.[5]

STATUTES INVOLVED

The statutes of the United States which are involved in this proceeding are the Emergency Price Control Act of 1942,[6] particularly sections 302(c) and 302(c)(2)[7] thereof

4. Act. Jan. 30, 1942, C. 26, Title II, §204(d), 56 Stat. 31, 50 U.S.C.A. App., Section 924(d).

5. U.S.C., 1934 edition, title 28, §347.

6. Act January 30, 1942, C. 26, 56 Stat. 23; 50 U.S.C.A. App. §§901 et seq.

7. Act January 30, 1942, C. 26, Title III, §§302(c) and 302(c)(2), 56 Stat. 36; 50 U.S.C.A App. §§942(c) and 942(c)(2). The pertinent provisions of these sections are set out at page 3 herein.

and the Inflation Control Act of 1942,[8] particularly Section 1 thereof.[9]

QUESTIONS PRESENTED

The essential question presented in this petition is this: Is petitioner a public utility within the meaning of Section 302(c)(2) of the Price Act as amended by the proviso of Section 1 of the Inflation Act and, as such, exempt from regulation by the respondent, Price Administrator, as to the rates charged by it for storage and warehousing and all other services incident thereto?

Incidental to this question, as it was considered in the court below, the following questions necessarily are presented:

1. Did the court below properly construe Section 302(c)(2) of the Price Act as amended by the proviso of Section 1 of the Inflation Act to mean that Congress intended to exempt only the classes of common carriers and public utilities characterized as the "traditional utilities"?

2. If so, are public utility warehousemen "traditional utilities" within that characterization?

3. In enacting Section 302(c)(2) of the Price Act as amended by the proviso of Section 1 of the Inflation Act, did Congress intend to exempt from regulation by the respondent only those classes of common carriers or other

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8. Act October 2, 1942, C. 578, 56 Stat. ___; 50 U.S.C.A. App., §§961 et seq.

9. Act October 2, 1942, C. 578, §1, 56 Stat. ___; 50 U.S.C.A. App. §964. This section is set out in footnote 3 on page 5 herein.

public utilities which are subject to regulation by an existing Federal, State or municipal authority?

4. In enacting Section 302(c)(2) of the Price Act as amended by the proviso of Section 1 of the Inflation Act, did Congress intend that the application thereof would be dependent (a) upon the laws of the several states which by their terms subject common carriers and other public utilities to maximum rate regulation, or (b) upon Federal, State and municipal laws which by their terms subject common carriers and other public utilities to such regulation?

5. In enacting Section 302(c) of the Price Act, did Congress intend to exempt from regulation by respondent the rates charged by common carriers which engage in the distribution of commodities but not the rates charged by public utility warehousemen which engage in the storage of commodities?[10]

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The diversity of opinion among the judges of the Emergency Court of Appeals as well as the uncertainty of the conclusions expressed by the two judges who joined in the majority opinion, justify the allowance of the writ.

2. The writ should be allowed because the Emergency Court of Appeals has decided an important question of

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10. Section 302(c) defines the term "Commodity" as including "services rendered • • • in connection with the processing, *distribution*, *storage*, installation, repair, or negotiation of purchases or sales of a commodity • • •" (Emphasis supplied.)

Federal law which has not been, but should be, settled by this Court.

3. The writ should be allowed because the Emergency Court of Appeals has decided a question of general importance which has not been, but should be, settled by this Court.

4. The writ should be allowed because the Emergency Court of Appeals has not given proper effect to applicable decisions of this Court.

CONCLUSION

For the reasons indicated above, as elaborated in the brief filed herewith, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Emergency Court of Appeals to the end that this cause may be reviewed and determined by this Court, and that the judgment of the Emergency Court of Appeals may be reversed, and that your petitioner may have such further and other relief as this Court may deem proper in the premises.

Respectfully submitted,

REGINALD L. VAUGHAN,
Counsel for Petitioner.

Dated at San Francisco, California,
June 19th, 1943.

FILE COPY

Office - Supreme Court, U. S.
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 112

DAVIES WAREHOUSE COMPANY, a corporation,
Petitioner,

vs.

PRENTISS M. BROWN, Price Administrator,
Respondent.

Brief in Support of Petition for a Writ of Certiorari to the United States Emergency Court of Appeals.

REGINALD L. VAUGHAN,
Counsel for Petitioner.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

Subject Index

Page

Preliminary Statement 1

Specifications of Errors Intended to Be Urged 2

Chronological Statement 3

Argument 4

I. Complainant Is a Public Utility Under California Law 4

II. Argument In Support of Reasons Relied on for the Allowance of the Writ 6

A. The Diversity of Opinion Among the Judges of the Emergency Court of Appeals as Well as the Uncertainty of the Conclusions Expressed by the Two Judges Who Joined in the Majority Opinion, Justify the Allowance of the Writ 6

1. The Diversity of Opinion Among the Judges of the Emergency Court of Appeals 6

2. The Uncertainty of the Conclusions Expressed by the Two Judges Who Joined in the Majority Opinion 10

B. The Writ Should Be Allowed Because the Emergency Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court 11

C. The Writ Should be Allowed Because the Emergency Court of Appeals Has Decided a Question of General Importance Which Has Not Been, but Should be, Settled by This Court 13

1. It Is Not, and Never Has Been, the Contention of Petitioner That the Application of the Exemption Clause in Question Was Made Dependent Upon State Laws. Petitioner Does Contend, However, That Its Application Is Made Dependent Upon Federal, State and Municipal Laws Which by Their Terms Subject the Rates Charged by Common Carriers or Other Public Utilities to Regulation 13

Page

2. The Language Used in the Exemption Clause, as Amended, Expresses an Intention Which Is Perfectly Intelligible and Plain and There Is No Reason, Therefore, to Resort to Antecedent Legislative History in Aid of Construction. However, Even if That History Is Examined It Shows That Petitioner's Contention Is Correct 16

3. The Theory Adopted by the Majority Opinion Is Inconsistent With the Intent and Purpose of the Statute 21

4. Public Utility Warehousemen Are Regulated Extensively Throughout the United States and Are Entitled to be Treated as Traditional Utilities to the Same Extent as the Common Carriers and Other Public Utilities Which Respondent Has Specifically Exempted 24

5. In Enacting Section 302(c) of the Price Act, Congress Could Not Have Intended to Exempt the Rates Charged by Common Carriers in the Distribution of Commodities Unless It Also Intended to Exempt the Rates Charged by Public Utility Warehousemen in the Storage of Commodities 26

D. The Writ Should Be Allowed Because the Emergency Court of Appeals Has Not Given Proper Effect to Applicable Decisions of This Court 31

Conclusion 33

Appendix "A" i

Appendix "B" xxiii

Appendix "C" xxv

Index to Authorities

Pages

TABLE OF CASES

Boston, Mass., Commercial Zone, 31 M.C.C. 405 29
Budd v. New York, 143 U.S. 517 32

Chicago, Illinois, Commercial Zone, 1 M.C.C. 673 29
Cincinnati, Ohio, Commercial Zone, 26 M.C.C. 49, 41 M.C.C. 227 29
City of Phoenix v. Kasun, 54 Ariz. 470, 97 P.(2d) 211 32

Kansas City, Mo.-Kansas City, Kans., Commercial Zone, 31 M.C.C. 5 29
Keifer and Keifer v. R. F. C., 306 U.S. 381 5

Los Angeles, California, Commercial Zone, 3 M.C.C. 248 29
Lyeth v. Hoey, 305 U.S. 188 14

Munn v. Illinois, 94 U.S. 113 31

Nebbia v. New York, 291 U.S. 502 32
New York, N. Y., Commercial Zone, 1 M.C.C. 665; 2 M.C.C. 191 29

Ozawa v. United States, 260 U.S. 178 16

Philadelphia, Pennsylvania, Commercial Zone, 17 M.C.C. 533 29
Producers Trans. Co. v. Railroad Comm. of Calif., 251 U.S. 228 32

Standard Fashion Company v. McGrane-Houston Company, 258 U.S. 346 10
St. Louis, Missouri-East St. Louis, Illinois, Commercial Zone, 1 M.C.C. 656; 2 M.C.C. 285 29

Terminal Taxicab Co. v. District of Columbia, 241 U.S. 252 32
Thompson v. United States, 246 U.S. 547 10

Pages

United States v. American Trucking Associations, Inc., 310 U.S. 534 16

United States v. Great Northern Railway Company, 287 U.S. 144 10

Washington, D. C., Commercial Zone, 3 M.C.C. 243 29

Wilbur v. United States, ex rel. Vindicator Consolidated Gold Mining Company, 284 U.S. 231 10

STATUTES CITED

Constitution of California:

Section 33 of Article IV; Mason's Constitution of California, Annotated (1933), p. 674 5

Section 23 of Article XII; Mason's Constitution of California, Annotated (1933), p. 1444 5

Emergency Price Control Act of 1942: Act Jan. 30, 1942, C. 26, 56 Stat. 23; 50 U.S.C.A. App. §§901 et seq.:

Section 204(d); Act Jan. 30, 1942, C. 26; Title II, §204(d), 56 Stat. 31, 50 U.S.C.A. App., Section 924(d) 6

Section 302(e); Act Jan. 30, 1942, C. 26, Title III, §302(e), 56 Stat. 36; 50 U.S.C.A. App., Section 942(e) 3, 27

Section 302(e)(2), Act Jan. 30, 1942, C. 26, Title III, §302(e)(2), 56 Stat. 36; 50 U.S.C.A. App. §942(e)(2) 2, 3, 6, 7, 10, 13, 16, 19, 20, 24, 31

Inflation Control Act of 1942, Section 1; Act October 2, 1942, c. 578, 56 Stat. ....; 50 U.S.C.A. App. §961 ..... 2, 3, 6, 7, 10, 13, 16, 19, 24, 31

Motor Carrier Act, 1935, Section 203(b)(8); Act. Feb. 4, 1887, c. 104; Part II, §203, as added Act Aug. 9, 1935, c. 498, 49 Stat. 544 and amended Act June 23, 1938, c. 601, §1107(j), 52 Stat. 1029; Act June 29, 1938, c. 811, §§2, 3, 52 Stat. 1237; Act. Sept. 18, 1940, c. 722, Title I, §§16, 18, 54 Stat. 919, 920; 49 U.S.C.A. §303(b)(8) 23, 28

Pages

Public Utilities Act of the State of California; California Statutes 1915, p. 115, as amended; Deering's General Laws of California (1937) Volume Two, pp. 3119 et seq. 5

Section 2(aa); California Statutes 1915, p. 118; Deering's General Laws of California (1937) Volume Two, p. 3124 5

Section 2 (dd); California Statutes 1937, p. 2478; Deering's General Laws of California (1937) Volume Two, p. 3125 5

Section 2½; California Statutes 1927, p. 1918; Deering's General Laws of California (1937) Volume Two, p. 3126 5

SUPREME COURT OF THE UNITED STATES

October Term, 1943

No. 112

Davies Warehouse Company, a corporation,
Petitioner,

vs.

Prentiss M. Brown, Price Administrator,
Respondent.

Brief in Support of Petition for a Writ of Certiorari to the United States Emergency Court of Appeals.

PRELIMINARY STATEMENT.

We are mindful of the rule of this Court that briefs must be short and concise. Regretfully, we have been compelled to indulge in rather extensive discussion of the many questions raised in this proceeding in order that the reasons which we urge as justifying the allowance of the writ may be made clear and shown to be meritorious.

For a statement of the grounds on which the jurisdiction of this Court is invoked and a statement of the case, reference is hereby made to the petition on file herein.

SPECIFICATIONS OF ERRORS INTENDED TO BE URGED.

It is respectfully submitted that the United States Emergency Court of Appeals has erred:

1. In holding that petitioner is not a public utility within the meaning of Section 302(c)(2) of the Emergency Price Control Act of 1942 as amended by the proviso of Section 1 of the Inflation Control Act of 1942.

2. In holding that petitioner is not exempt from The General Maximum Price Regulation promulgated by the respondent, Price Administrator.

3. In construing Section 302(c)(2) of the Price Act as amended by the proviso of Section 1 of the Inflation Act to mean that Congress intended to exempt only the classes of common carriers and public utilities which are characterized as the "traditional utilities".

4. In failing to hold that a public utility warehouseman is a "traditional utility" within that characterization.

5. In failing to hold that, when Congress enacted Section 302(c)(2) of the Price Act as amended by the proviso of Section 1 of the Inflation Act, it intended to exempt from regulation by the respondent only the rates of those classes of common carriers or other public utilities which are subject to regulation by an existing Federal, State or municipal authority.

6. In failing to hold that, when Congress enacted Section 302(c)(2) of the Price Act as amended by the proviso of Section 1 of the Inflation Act, it intended that the application thereof would be dependent upon Federal, State and municipal laws which regulate the rates and charges of common carriers and other public utilities.

7. In failing to hold that when Congress enacted Sections 302(c) and 302(c)(2) of the Price Act as amended by the proviso of Section 1 of the Inflation Act, it intended to exempt the rates charged by common carriers in the distribution of commodities as well as the rates charged by public utility warehousemen in the storage of commodities, and

8. In dismissing the complaint.

CHRONOLOGICAL STATEMENT.

The chronology, which is pertinent in this case, is as follows:

The General Maximum Price Regulation issued by respondent on April 28, 1942. (R. 46)

Supplementary Regulation No. 11 to The General Maximum Price Regulation issued by respondent on June 16, 1942. (R. 97)

Amendment No. 1 to said Supplementary Regulation No. 11 issued by respondent on June 23, 1942. (R. 101)

Protest filed by petitioner before respondent on June 26, 1942. (R. 15)

Order of respondent denying said protest, dated July 27, 1942. (R. 41)

Opinion of respondent accompanying the said order denying protest, dated July 27, 1942. (R. 42)

Complaint of petitioner against respondent filed on August 25, 1942 in the Emergency Court of Appeals. (R. 1)

Answer of respondent to said complaint filed in the Emergency Court of Appeals on September 5, 1942. (R. 13)

Order of the Emergency Court of Appeals dated January 25, 1943, substituting Prentiss M. Brown as respondent in said complaint in the place and stead of Leon Henderson. (R. 146)

Opinion of the Emergency Court of Appeals dated May 28, 1943, directing the dismissal of said Complaint together with concurring and dissenting opinions. (R. 109)

Judgment Order of the Emergency Court of Appeals dismissing the Complaint made and entered on May 28, 1943. (R. 145)

ARGUMENT.

I.

COMPLAINANT IS A PUBLIC UTILITY UNDER CALIFORNIA LAW.

Inasmuch as respondent has conceded that petitioner is a public utility under the laws of California, it is unnecessary to discuss those laws other than to say that the business of a public warehouseman is declared to be that of

a public utility and is so regulated by the Railroad Commission of California under and by virtue of Sections 33 of Article IV and 23 of Article XII of the California Constitution[1] and Sections 2(aa),[2] 2(dd)[3] and 2½[4] of the Public Utilities Act of the State of California.[5]

The fact that petitioner is a public utility under California law, as conceded by respondent, is, we feel, determinative of the issues raised in this proceeding in petitioner's favor.

The exemption under question applies to the "rates charged by any common carrier or other public utility". There is no limitation expressed by Congress as to which common carriers or public utilities it had in mind. The doctrine announced in *Keifer & Keifer v. R. F. C.*,[6] so strongly relied upon in the majority opinion, actually supports petitioner's contention, for, had Congress intended to express a limitation of the term "public utility", as it might have done, it would have done so.

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1. Mason's Constitution of California, Annotated (1933) pp. 674, 1444.

2. California Statutes 1915, p. 118; Deering's General Laws of California (1937) Volume Two, p. 3124.

3. California Statutes 1937, p. 2478; Deering's General Laws of California (1937) Volume Two, p. 3125.

4. California Statutes 1927, p. 1918; Deering's General Laws of California (1937) Volume Two, p. 3126.

5. Statutes 1915, p. 115, as amended. Except for amendments adopted since 1937, which have no pertinency to this proceeding, all of the provisions of the Public Utilities Act may be found in Deering's General Laws of California (1937), Volume Two, commencing at page 3119.

6. 306 U.S. 381, 395.

II.

ARGUMENT IN SUPPORT OF REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

A. The Diversity of Opinion Among the Judges of the Emergency Court of Appeals as Well as the Uncertainty of the Conclusions Expressed by the Two Judges Who Joined in the Majority Opinion, Justify the Allowance of the Writ.

1. The diversity of opinion among the Judges of the Emergency Court of Appeals.

In subparagraph 5(b) of Rule 38 of the Revised Rules of Court it is indicated that this Court will review a case where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter.

Inasmuch as under Section 204(d) of the Price Act, the Emergency Court of Appeals (except for the jurisdiction of this Court on review) has exclusive jurisdiction to determine the validity of any regulation or order issued by the respondent, Price Administrator, there is, of course, no other court of equal jurisdiction whose decision might be in conflict with the decision under attack.

However, by analogy, we find that among the Judges of the Emergency Court of Appeals, there is a marked diversity of opinion as to whether or not petitioner is entitled to exemption under Section 302(c)(2) of the Price Act, as amended by the proviso of Section 1 of the Inflation Act.

In rendering the majority opinion of the Emergency Court of Appeals (R. 109), Judge Maris has held that while petitioner may be operating as a public utility under

California law, it is not a "public utility" within the meaning of Section 302(c)(2) of the Price Act as amended by the proviso of Section 1 of the Inflation Act, and, therefore, is not entitled to exemption from The General Maximum Price Regulation promulgated by the Price Administrator, and that the latter committed no error in denying the petitioner's protest (R. 118).

In dissenting from the majority opinion (R. 119), Chief Judge Vinson emphatically held that petitioner's public warehouse is a business which is:

> "(1) affected with a public interest, and (2) bears an intimate connection with the processes of transportation and distribution, and (3) is under an obligation to afford its facilities to the public generally, upon demand, at fair and non-discriminatory rates, and (4) enjoys in a large measure an independence and freedom from economic competition brought about by the grant of a franchise from the state placing it in this position. In addition complainant has its rates fixed by an agency of the state, and it possesses many other customarily incidental features of public utilities.
>
> "Under these circumstances, complainant must be considered a public utility within the virtually universal significance of the term, and, thus, included within the meaning of the term as employed in the Price Act of 1942. Consequently, it should be held that complainant is entitled to the exemption as provided in Section 302(c), and that the General Maximum Price Regulation, Supplementary Regulation No. 11, and Amendment No. 1 thereto be set aside insofar as they purport to affect the complainant's charges concerned." (R. 144)

In concurring with the majority opinion of Judge Maris, Judge Magruder prefaced his opinion (R. 118) in the following language:

> "With some hesitation, I concur in the result reached by Judge Maris. This is one of those unfortunate cases where doubts would remain whichever way the case was decided.
>
> "Judge Vinson in his dissenting opinion has amply demonstrated that complainant has the characteristics of a 'public utility' within the connotation of that phrase in widespread usage. * * *"[7]

It is thus seen that a striking situation is presented by the opinions of the learned Judges of the lower court. We believe that this diversity of opinion can be traced directly to an erroneous approach to the problem.

Much of the discussion in the opinions is devoted to an abstract consideration of the nature of certain kinds of business enterprises. It is conceded by the majority opinion that great difficulty is faced in an effort to define the term "public utility". Judge Maris in the majority opinion states that (R. 115):

> "The data which we have considered do not disclose any clear criteria from which a precise definition of the phrase 'public utility' may be constructed".

He recognizes that (R. 116):

> "Among the data to be considered in determining the natural and ordinary meaning of 'public utility' is the manner in which the term has been used in *state legislation.*" (Emphasis supplied)

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7. Judge Maris concurred in the views expressed by Judge Magruder (R. 119).

Yet he is disposed to resort to (R. 116)

"the manuals used by the financial community".

Judge Magruder feels that Congress used the term "loosely and somewhat vaguely as comprehending the familiar and garden variety businesses which would immediately suggest themselves to the lay mind when the phrase 'public utility' is used * * *". (R. 119)

While Chief Judge Vinson, to a certain degree, indulges in a discussion of the definition of the term "public utility", nevertheless the marked difference between his approach to the problem and that of the majority members lies in the direct consideration and application of the facts presented by the record in this case. Judge Vinson adheres strictly to the fundamental rule that abstract questions have no place before appellate tribunals and will be disregarded. He confines his discussion to facts of record and finally points to statements in respondent's brief which, he says: "come close to committing him to an agreement that complainant's warehouse should be regarded as a public utility". (R. 144)

In this connection, we wish to direct the attention of this Court to the fact that respondent did not deny (R. 13) the material allegations in petitioner's complaint to the effect that petitioner is, and has at all times conducted its business as, a public utility and that its rates are, and always have been, subject to the jurisdiction and control of the Railroad Commission of the State of California. (R. 1 et. seq.) Furthermore, during the course of the oral argument had before the Emergency Court of Appeals, counsel for respondent conceded that the fact that peti-

tioner was a public utility under California law was not at issue.

The dissenting opinion rendered by Chief Judge Vinson should, we submit, be the majority opinion in this case, since it deals with the disputed questions upon a sound and logical basis. It is significant to note that in reluctantly concurring with Judge Maris' opinion, Judge Magruder concedes that Judge Vinson, in his dissenting opinion, "has amply demonstrated that complainant has the characteristics of a 'public utility' within the connotation of that phrase in widespread usage". (R. 118)

As we have pointed out above, the fundamental question here raised is: are the rates charged by petitioner subject to regulation by the respondent, or are they exempt from his regulation by virtue of the provisions of Section 302(c)(2) of the Price Act as amended by the proviso of Section 1 of the Inflation Act? If the question, thus limited, is constantly borne in mind, there can be no room for an abstract discussion of points and problems which are unrelated to those presented by the record.

2. The Uncertainty of the Conclusions Expressed by the Two Judges Who Joined in the Majority Opinion.

Not only is there a diversity of opinion existing among the Judges of the Emergency Court, but an uncertainty is expressed by two of the Judges as to the correctness of the result reached by them in the majority opinion. It is the opinion of one Judge that petitioner is not exempt within the meaning of Section 302(c)(2) of the Price Act as amended by the proviso of Section 1 of the Inflation Act; the opinion of another is exactly opposite, while that

of the third states that he is not sure that he is correct in concurring with the first Judge. Since the first Judge concurs in the views of the third Judge, the conclusion is properly drawn that the only Judge certain of his conclusions is the dissenting Judge.

Bearing in mind that the Emergency Court of Appeals is the only court which has jurisdiction to determine the validity of any regulation or order of respondent, Price Administrator (except for the right of review by this Court), it is not asking too much, we submit, that a question of such gravity and general importance as is here raised be decided with more certainty than as decided by that court.

B. The Writ Should Be Allowed Because the Emergency Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court.

In sub-paragraph 5(b) of Rule 38 of the Revised Rules of Court, it is indicated that this Court will review a case where a circuit court of appeals has decided an important question of Federal law which has not been, but should be, settled by this Court.

The protest (R. 19), as well as the Complaint (R. 12), were instituted by petitioner on behalf of itself and all other warehousemen in California who operate as public utilities in that State under the jurisdiction and control of the Railroad Commission of the State of California, pursuant to constitutional and statutory law of that State.

Petitioner has contended throughout this proceeding, and urges here, that it is in the "nature of a test case" to determine whether or not respondent has the authority

to regulate the rates charged by petitioner and such other public utility warehousemen in California for storage and warehousing and all other services incident thereto which they render to the public as public utilities under the laws of that State. It is in the "nature of a test case" because the outcome thereof will affect all other of such warehousemen alike and will be even more far reaching in that its outcome will determine whether respondent has power to regulate the rates and charges of common carriers and other public utilities throughout the nation which are not subject to maximum rate regulation by any existing Federal, State or Municipal authority.

It is respondent's position that Congress intended only to exempt the traditional utilities. As shown on page 4 of the petition herein, he has designated these traditional utilities to be (a) common carriers by rail, water, motor, pipe line, express and freight forwarder; and (b) electric, gas, light, heat or power, telephone, telegraph and water utilities.

Under this theory of exemption, respondent has concluded that the classes of common carriers and public utilities so exempted are excluded from his regulation throughout the nation, *regardless of whether or not such common carriers and public utilities are subject to regulation by existing Federal, State or municipal authorities.* For example, all of the exempted classes of common carriers and public utilities which operate within the State of Delaware (where they are not subject to State regulation) are exempt from his regulation and are free to increase their rates or charges without any regulatory restraint whatever.

In sharp conflict with this construction, petitioner contends that Congress intended that the exemption would only apply to the rates of those classes of common carriers or other public utilities which are subject to regulation by existing Federal, State or municipal authorities.

Petitioner respectfully submits that the issue thus raised presents a question of Federal law which is extremely important as well as novel and original and which has not been, but should be, settled by this Court.

C. The Writ Should be Allowed Because the Emergency Court of Appeals Has Decided a Question of General Importance Which Has Not Been, but Should be, Settled by This Court.

1. It Is Not, and Never Has Been; the Contention of Petitioner That the Application of the Exemption Clause in Question Was Made Dependent Upon State Laws. Petitioner Does Contend, However, That Its Application Is Made Dependent Upon Federal, State and Municipal Laws Which by Their Terms Subject the Rates Charged by Common Carriers or Other Public Utilities to Regulation.

In sub-paragraph 5 (c) of Rule 38 of the Revised Rules of Court, it is indicated that this Court will review a case where the United States Court of Appeals for the District of Columbia has decided a question of general importance which has not been, but should be, settled by this Court.

As heretofore noted, the theory of petitioner in this case is that the exemption clause contained in Section 302(d)(2) of the Price Act as amended by the proviso of Section 1 of the Inflation Act, applies only to the rates of common carriers or other public utilities which are subject to the jurisdiction and control of existing Federal,

State and municipal authorities. Judge Maris attacks this theory on the ground that it limits the scope of the application of the exemption clause and violates the principle that a Federal statute will, in the absence of language in the statute to indicate a contrary intent, be given a general and uniform application throughout the country. In support thereof, he cites the case of *Lyeth v. Hoey*.[8] (R. 111)

This has never been petitioner's contention. However, we have insisted that the application of the exemption was made dependent upon those Federal, State and municipal laws which regulate the rates of common carriers and other public utilities. It would be futile for any one to argue that any kind of a price control act could be designed for any purpose other than to effectuate complete control of prices everywhere within the federal jurisdiction. It, therefore, seems useless to discuss this abstract principle as such.

The fallacy in the use of this principle by respondent and the majority opinion lies in an apparent misconception of the ultimate aim of Congress in enacting the statute, and particularly those significant provisions under which the Price Administrator was deprived of the power to regulate certain rates. Since the fundamental purpose sought to be achieved by the Price Act is the prohibition against undue price rises to stem inflation, the conclusion is inescapable that the subject matter of the legislation was confined to regulation of prices, charges

8. 305 U. S. 188, 194.

and rates for the purpose of keeping down the cost of living to the public.

It is, therefore, significant that in creating certain exemptions outside the scope of the Act, Congress accomplished the exclusion by referring, not to business enterprises as such, but to the prices and rates charged by them. We believe that the failure of the majority opinion to adhere to this point has resulted in a departure from the path of true reasoning to a correct interpretation of the intent of the exemption clause in question. The point of the dispute between the parties to this proceeding has been confused by resort to an abstract discussion of generalities and definitions of terms rather than to the facts presented by the record.

It is not so much a question here of the definition of the term "public utility"; it is rather a question of "rates" and what Congress meant by the use of that particular word. Neither the elementary rules of statutory interpretation nor the historical background of judicial construction are particularly apposite to or helpful in the solution of this problem. We believe that the inquiry need go no further than a consideration of the circumstances under which the legislation was enacted, the purposes to be achieved thereby and the conception of those purposes in the minds of those who caused the statute to be written in the words in which it stands.

2. The Language Used in the Exemption Clause, as Amended, Expresses an Intention Which Is Perfectly Intelligible and Plain and There Is No Reason, Therefore, to Resort to Antecedent Legislative History in Aid of Construction. However, Even if That History Is Examined It Shows That Petitioner's Contention Is Correct.

The essential provisions of the exemption clause, as stated in Section 302(c)(2) of the Price Act as amended by the proviso of Section 1 of the Inflation Act, read as follows:

> "Nothing in this Act shall be construed to authorize the regulation of * * * rates charged by any common carrier or other public utility" * * * "Provided, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase."

These words are to be construed in their natural significance bearing in mind that the main purpose of the statute in which they are contained is to prevent inflationary price rises.[9] The proper and reasonable construction of these words is that if such common carriers or other public utilities are adequately regulated as to their rates and charges by an existing Federal, State or municipal authority, Congress did not intend them to be burdened with

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9. *Ozawa v. United States*, 260 U.S. 178, 194; *United States v. American Trucking Associations, Inc.*, 310 U.S. 534, 543.

further price control any more than it intended that the Price Administrator would, himself, be burdened with the duty of regulating them.

That language expresses an intention which is perfectly intelligible and plain, and we submit that, (under the rule that the intention of a statute must be sought primarily in the language of the statute itself), if the language employed expresses an intention reasonably intelligible and plain, it must be accepted without modification or resort to construction or conjecture[10] and that antecedent legislative history may not be looked to in aid of construction.[11]

In view of the plain and clear language employed by Congress in the clause under question, there is no reason to resort to antecedent legislative history. However, since this legislative history is discussed with particularity in the majority and dissenting opinions and is mentioned in the concurring opinion, we believe it appropriate that all of that legislative history be placed before this Court and, accordingly, have included it in Appendix "A", hereto attached.

A fair and logical analysis of the history of this legislation leads to one main conclusion with respect to the intent of the exemption clause. While the affirmative pro-

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10. *Thompson v. United States*, 246 U.S. 547; *Standard Fashion Company v. McGrane-Houston Company*, 258 U.S. 346; *Wilbur v. United States, ex rel. Vindicator Consolidated Gold Mining Company*, 284 U.S. 231; *United States v. Great Northern Railway Company*, 287 U.S. 144; *United States v. American Trucking Associations, Inc.*, 310 U.S. 534.

11. *Standard Fashion Company v. McGrane-Houston Company*, 258 U.S. 346; *United States v. American Trucking Associations, Inc.*, 310 U.S. 534.

visions of the Act embrace all prices, charges and rates throughout the country, there were, as appeared to Congress, certain rates as to which there was no necessity of control by the Price Administrator. *The question is, what were those rates?*

Congress specified these rates as those "charged by any common carrier or other public utility". Why did it exclude them? Obviously, for the good and sufficient reason that it appeared that by such exclusion there would be no danger of an encroachment on the anti-inflationary effort. It was pointed out by the Price Administrator, himself, that no such danger existed. He told Congress that it was unnecessary for him to control these rates because they were adequately controlled and regulated by other Governmental agencies—Federal, State and municipal. As he said, these agencies were the various utility commissions—those clothed with the statutory function and duty to regulate rates. For instance, in his correspondence with Senator Norris and in the Senator's own comments, the mention of these agencies was confined solely to public utility commissions.

So, when Congress came to define exempted rates, it could have had in mind only one kind of rates, namely, those which were under the supervision and control of the various public utility rate regulatory bodies. It was not concerned with all of the refinements of the definition of the term "public utility"; it was interested only in relieving the Price Administrator from the duty of controlling rates which were otherwise adequately controlled. Congress took the Price Administrator at his word. He plainly told them that he was perfectly satisfied with the

regulatory bodies and the statutory processes under which they functioned. He did not see fit to call attention to any distinction that he may have had in mind as between "traditional public utilities" and other classes of utilities. He led Congress to believe, as it has expressly declared in the exemption clause, that if the rates charged by any common carrier or other public utility are under the regulatory control of an existing Federal, State or municipal rate-making body, it would be unnecessary for him to have anything to do with those rates. *These are the circumstances which compel us to take the position in this case that, since the rates of this petitioner are and have always been under the jurisdiction and control of the Railroad Commission of the State of California, they are within the meaning and intent of the exemption clause.*

Inasmuch as the purpose sought to be achieved by the Price Act was to prevent inflationary price rises, it is clear that the language employed in Section 302(c)(2) showed an intent to exempt only the rates charged by such common carriers or other public utilities as were under regulation by existing regulatory agencies, Federal, State or municipal. However, if any doubt existed as to that conclusion with respect to the language used in Section 302(c)(2), it has been definitely and finally disposed of by the language employed in the proviso of Section 1 of the Inflation Act where Congress specifically refers to the regulation of the rates by "the Federal, State or municipal authority having jurisdiction to consider such increase".

By virtue of the adoption of the amendment, the issue raised in this proceeding was thereby effectually settled

in accordance with the contention which petitioner has persistently maintained.

The legislative history further shows that Senator Norris, ever the advocate of Governmental regulation of common carriers and public utilities, had developed in his mind an apprehension that the coverage of the Price Act was incomplete because he felt that the rates and charges of public utilities all over the country should be brought under the control of the Federal Government and that the exemption specified in Section 302(c)(2) of the Act should be abolished. Accordingly, he proposed an amendment to the Act which would have eliminated the exemption clause and would have provided that any rates charged by a common carrier or other public utility could not be increased after September 15, 1942, without the consent of the President.

In presenting this amendment to the Senate, Senator Norris read and discussed correspondence exchanged between him and the respondent relative to the question covered by his amendment. Respondent explained that he was attempting to keep close watch over applications for rate increases by public utilities in various parts of the country. He went on to say that he and his office were "proceeding in the belief that when Congress exempted these rates from our jurisdiction, it was implied that these Commissions would recognize that the dominant principle governing the fixing of all prices in wartime would be the Government's program to stabilize commodity prices and the cost of living and that the utility and railroad rate principles must be re-examined in the light of the Government's economic program, upon the success of

which depends both the winning of the war and the peace. Their recognition of this obligation will be an important step in the success of the Government's program to prevent further increases in the cost of living."

The Norris amendment was rejected by the Senate and, in lieu thereof, the amendment above quoted was adopted. At the time of its adoption Senator Brown, from the floor of the Senate, said:

> "There is substituted for it (the Norris amendment) a provision which will require any public utility which asks for an increase in rates to notify the President and to assent to the appearance of such agent as the President may designate to appear in behalf of the consuming public before the appropriate railroad or public utility commission, be it a State, Federal or municipal commission."

No system of concurrent jurisdiction was set up. Certain rates had been removed from under the Price Administrator's control in the Price Act. If there had been any uncertainty as to what these rates were intended to be, it was completely eliminated by the amendment which designated them as those which were under the jurisdiction and control of existing Federal, State or municipal agencies.

3. The Theory Adopted by the Majority Opinion Is Inconsistent With the Intent and Purpose of the Statute.

We have noted above that respondent contends that the exemption clause includes only those public utilities traditionally recognized as such, whether or not they are regulated by Federal, State or municipal agencies. The

majority opinion has adopted this theory which, we maintain, would lead to an impossible and absurd situation.

In denying petitioner's protest (R. 42), respondent pointed out that a warehouseman could not be a public utility within the meaning of the exemption clause, because while in some states he was regulated as such, in others he was not. He drew a distinction between warehousemen and his so-called "traditionally recognized utilities", i.e., water, power, telephone, heat, gas and light companies which, he implied, were almost universally regulated by State or local agencies.

In order to prevent confusion, petitioner has digested the statutes of every state in the country and has compiled statistics pertaining to the extent of the regulation exercised by the states over the major classes of common carriers and public utilities in order that a true comparison could be drawn between the traditionally recognized utilities as designated by the respondent, on the one hand, and public utility warehousemen, on the other. This analysis of the statutes in the several states[12] will show that out of the forty-eight states there is no existing regulation of railroads in one state, common carrier truck lines in 4 states, common carrier bus lines in one state, common carriers by vessel in 23 states, express common carriers in 2 states, pipe line common carriers in 24 states, electric utilities in

12. There is attached hereto as Appendix "B" a chart showing the extent to which the rates or charges of the major classes of common carriers or other public utilities are regulated by the several states of the United States. The provisions of the state laws which define these common carriers and public utilities and which subject them to such rate regulation are cited in Appendix "C" hereto attached.

7 states, gas utilities in 8 states, heat utilities in 20 states, telephone utilities in 2 states, telegraph utilities in 4 states, and water utilities in 8 states. Furthermore there is no rate regulation by the Interstate Commerce Commission or any other Governmental authority of common carriers by motor vehicle in the transportation of property in interstate or foreign commerce within the partially exempt zones as defined in Section 203(b)(8) of the Motor Carrier Act, 1935 (Part II of the Interstate Commerce Act).[13]

It must follow under respondent's theory of exemption, which has been sanctioned by the majority opinion of the Emergency Court of Appeals, that as to these unregulated utilities and common carriers, there is no regulatory restraint imposed upon them and they may increase their rates or charges at will.

The majority opinion states (R. 117):

> "Indeed, it may be said that the Emergency Price Control Act itself is a Congressional determination that, at least in war time, *every* business in the country is so affected with a public interest as to require statutory control of its prices." (Emphasis supplied.)

Petitioner quite agrees with that portion of the majority opinion, but hardly sees how there can be statutory control of the prices of *every* business in the country when, under the construction which that Court has placed on

13. Act Feb. 4, 1887, c. 104, Part II, §203, as added Act Aug. 9, 1935, c. 498, 49 Stat. 544 and amended Act June 23, 1938, c. 601, §1107 (j), 52 Stat. 1029; Act June 29, 1938, c. 811, §§2, 3, 52 Stat. 1237; Act Sept. 18, 1940, c. 722, Title I, §§16, 18, 54 Stat. 919–920; 49 U.S.C.A. §303(b)(8).

Section 302(c)(2) of the Price Act as amended by the proviso of Section 1 of the Inflation Act, there is, and will be, no rate regulation by the Price Administrator, or anyone else, of the exempted classes of utilities where there is no existing regulation of them by Federal, State or municipal authorities.

4. Public Utility Warehousemen Are Regulated Extensively Throughout the United States and Are Entitled to Be Treated as Traditional Utilities to the Same Extent as the Common Carriers and Other Public Utilities Which Respondent Has Specifically Exempted.

In the majority opinion, it is stated (R. 116):

> "On the other hand only three states include all warehouses in their statutory definition of public utilities, while seven others include limited types of warehouses. Thirty-eight states and the District of Columbia do not define warehouses of any kind as public utilities * * *."

In reaching this conclusion, the majority opinion has accepted the statistics presented by respondent and has wholly ignored the statistics presented by petitioner which are shown in the chart attached hereto as Appendix "B". From our investigation of the state laws, we are convinced that California, Indiana, Minnesota and North Dakota exercise virtually complete control of the rates and charges of public utility warehousemen, while limited rate control thereof is exercised in Arkansas, Georgia, Idaho, Illinois, Iowa, Kansas, Maine, Missouri, Nebraska, Nevada, North Carolina, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington and Wisconsin. In other words, out of the

forty-eight states, public utility warehousemen are regulated in twenty-two thereof. Seventeen of the twenty-two states regulate the rates of these public utility warehousemen by and through railroad, public utility or public service commissions, namely, Arkansas, California, Georgia, Idaho, Illinois, Indiana, Iowa, Maine, Minnesota, Nebraska, Nevada, North Dakota, South Dakota, Texas, Utah, Washington and Wisconsin.

If the test of a traditional utility is the scope of said regulation, respondent's "traditional utilities" stand on somewhat doubtful ground. There is a substantial array of states which, by failing to regulate them, might fairly be said to classify them with those public utilities which respondent says are not within the exemption clause.

Respondent's theory, as adopted by the majority opinion, defeats itself. According to that theory, the Price Administrator is without power to supervise certain rates, although they be entirely free from other regulation. The judgment in this case now determines that as to all so-called "traditional utilities" in Delaware and as to some of them in other states, rates may be increased at will and in disregard of the anti-inflation program.

Certainly, Congress had no such intention in mind. How could the cost of living be universally controlled if, in important sections of the nation, the common carriers and public utilities specifically exempted under the Price Administrator's regulation may make uncontrolled increases in rates? Yet, that is precisely what the majority opinion decides.

The theory behind that opinion has no foundation. The finding that the exclusion clause is limited to such an uncertain quantity as a traditionally recognized utility is meaningless. There are many peculiarities in Federal legislation, but, in our opinion, Congress has never assumed such an absurd position as created by the majority opinion of the Court.

5. In Enacting Section 302(c) of the Price Act, Congress Could Not Have Intended to Exempt the Rates Charged by Common Carriers in the Distribution of Commodities Unless it also Intended to Exempt the Rates Charged by Public Utility Warehousemen in the Storage of Commodities.

In the majority opinion, it is stated (R. 116):

> "Some light is thrown upon the question whether a public warehouseman is a public utility within the meaning of the act by the language of the act itself. As we have seen, the very section which contains the proviso exempting public utilities states that the term 'commodity' as used in the act 'includes services rendered * * * in connection with the * * * storage * * * of a commodity'. Here is definite indication that storage of commodities, the business of a public warehouseman, is intended to be covered by the act."

While the service of "storage" is one specified as within the price control features of the Act, this was only included to provide control by the Price Administrator over (a) private storage by manufacturers, distributors and shippers having their own warehouses for the warehousing of their own goods (the cost of which is an appreciable, unregulated part of the market price of the goods held under private storage and receiving pri-

vate warehouse storage service) and (b) commercial storage in those states in which a public warehouseman is not subject to maximum rate regulation as a public utility.

It is to be noted in Section 302(c) that the word "distribution" is used in the same sense as, and precedes the word "storage". The bulk of "distribution" services is rendered by common carriers just as the "bulk of storage services is rendered by public warehousemen".

If, in order to control the price of a commodity, respondent must have the complete power to control the charge for services rendered in the "storage" of that commodity, it would be equally important, under that section, that he have the complete power to control the charge for services rendered in the "distribution" thereof. However, Congress has seen fit to relieve respondent of the burden of regulating the charges of already regulated common carriers rendering services in the "distribution" of a commodity, just as it has, in our opinion, relieved him of the responsibility of regulating the charges of already regulated public utility warehousemen rendering services in the "storage" of a commodity. It is respectfully submitted, therefore, that Congress could not have intended to exempt one without exempting the other.

Since respondent has officially excluded the rates and charges of all common carriers from his regulations, it must follow that he lacks power to regulate the rates and charges of a common carrier in rendering services in the "distribution" of a commodity. This would be true, according to respondent's theory of exclusion, whether the

rates for distribution services by a common carrier are subject to maximum regulation by a Federal, State or municipal authority, or not.

A large part of this distribution service is rendered by common carriers by motor vehicle within the larger metropolitan areas throughout the country and it cannot be disputed that a considerable portion of this distribution traffic is moved in interstate or foreign commerce. Under the provisions of Section 203(b)(8) of the Motor Carrier Act, 1935 (Part II of Interstate Commerce Act),[14] it is provided (with respect to the jurisdiction of the Interstate Commerce Commission over motor carriers) as follows:

> "(b) Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of services of employees and safety of operation or standards of equipment, shall be construed to include * * * (8) The transportation of * * * property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point, without such municipality, municipalities, or zone, * * *."[15]

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14. Act Feb. 4, 1887, c. 104, Part II, §203, as added Act Aug. 9, 1935, c. 498, 49 Stat. 544 and amended Act June 23, 1938, c. 601, §1107 (j), 52 Stat. 1029, Act June 29, 1938, c. 811, §§2, 3, 52 Stat. 1237; Act Sept. 18, 1940, c. 722, Title I, §§16, 18, 54 Stat. 919, 920; 49 U.S.C.A. §303(b)(8).

15. Except where the transportation is under a common control, management, or arrangement for a continuous carriage or shipment, the Interstate Commerce Commission has no maximum rate jurisdiction over common carriers by motor vehicle within

In preventing inflation it is admitted to be important that the maximum rates and charges of a warehouseman for services rendered in the "storage" of a "commodity" be subject to regulation by some public authority. Our only difference with respondent in this respect is that we contend that such maximum rate regulation of public utility warehousemen is to be exercised by existing regulatory authorities, whereas it is his contention that he possesses power over all warehouse rates and charges irrespective of existing government control other than his own.

It is equally important and even imperative that the maximum rates and charges of common carriers by motor vehicle for services rendered in the "distribution" of a "commodity" be subject to regulation by some public authority. Yet, since *all* common carriers have been declared by respondent to be excluded from his regulatory powers, what rate restraint, may we ask, could be imposed upon these common carriers by motor vehicle which distribute commodities moving in interstate or foreign

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such municipality, contiguous municipalities or commercial zones. While this partial exemption is fully effective without the requirement of the definition by the Commission of the boundaries of commercial zones some have actually been defined by it in the following communities: *Chicago, Illinois, Commercial Zone*, 1 M.C.C. (Interstate Commerce Commission Reports, Motor Carrier Cases) 673; *Boston, Mass., Commercial Zone*, 31 M.C.C. 405; *Cincinnati, Ohio, Commercial Zone*, 26 M.C.C. 49, 41 M.C.C. 227; *Kansas City, Mo.-Kansas City, Kans., Commercial Zone*, 31 M.C.C. 5; *Los Angeles, California, Commercial Zone*, 3 M.C.C. 248; *New York, N. Y., Commercial Zone*, 1 M.C.C. 665; 2 M.C.C. 191; *Philadelphia, Pennsylvania, Commercial Zone*, 17 M.C.C. 533; *St. Louis, Missouri-East St. Louis, Illinois, Commercial Zone*, 1 M.C.C. 656; 2 M.C.C. 285, and *Washington, D. C., Commercial Zone*, 3 M.C.C. 243.

commerce "within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities"?

The answer is plain that, if respondent's theory is correct, common carriers performing this type of service would be under no rate regulation whatever except where the laws of a state might empower it to prescribe maximum rates of common carriers operating in interstate or foreign commerce within such a municipality, municipalities or commercial zones. This bears out as forcibly as anything else that we could say that it was the intention of Congress that the rates and charges of common carriers would be excluded from respondent's regulations to the extent, and only to the extent, that they are under maximum rate jurisdiction of existing Federal, State and municipal authorities.

Chief Judge Vinson has recognized the soundness of petitioner's position in this regard, as evidenced by the following statement appearing in his dissenting opinion. (R. 143):

> "The respondent argues that the definition of 'commodity' in Section 302(a) to include services rendered 'in connection with the processing, *distribution, storage,* . . . of a commodity' (Italics supplied) expressly includes warehouses. But complainant has aptly pointed out that if this be so, railroads would also be included in the Price Administrator's control as they engage in the business of 'distribution' of commodities. It is true that certain storage facilities are subject to the controls of the Price Administrator,

but when a storage enterprise is conducted as a public utility, it falls within the provided exemption, which is dominant and controlling."

We respectfully submit that from the foregoing a question of gravity and general importance is raised in this proceeding which has not been, but should be, settled by this Court.

D. The Writ Should Be Allowed Because the Emergency Court of Appeals Has Not Given Proper Effect to Applicable Decisions of This Court.

In sub-paragraph 5(c) of Rule 38 of the Revised Rules of Court, it is indicated that this Court will review a case where the United States Court of Appeals for the District of Columbia has not given proper effect to an applicable decision of this Court.

The majority opinion of the Emergency Court of Appeals holds that while petitioner may be a public utility under California law, it is not a public utility within the meaning of Section 302(c)(2) of the Price Act as amended by the proviso of Section 1 of the Inflation Act.

Petitioner has nowhere contended, nor does it contend here, that the case of *Munn v. Illinois*[16] specifically held that a public warehouseman was a public utility, but this Court did say in that case that a public warehouseman was engaged in a business which the public interest de-

16. 94 U.S. 113.

mands "ought to be under public regulation."[17]

It is significant to note, however, the statement of Chief Judge Vinson (R. 132) that "The *Munn* case has frequently been the only citation offered in support of a proposition of law relating to *public utility* regulation" (Citing *Producers Trans. Co. v. Railroad Comm. of Calif.*, 251 U.S. 228, 231; *Terminal Taxicab Co. v. District of Columbia*, 241 U.S. 252, 254; also in *City of Phoenix v. Kasun*, 54 Ariz. 470, 97 P.(2d) 211, 212).

In *Budd v. New York*,[18] this Court said:

> "• • • the business of elevating grain is a business charged with a public interest, and those who carry it on occupy a relation to the community *analogous to that of common carriers.* The elevator owner, in fact, retains the grain in his custody for an appreciable period of time, because he receives it into his custody, weighs it, and then discharges it, and *his employment is thus analogous to that of a warehouseman.*" (Emphasis supplied.)

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17. 94 U.S. 113, 132. See *Nebbia v. New York*, 291 U.S. 502 at 533, where this Court, in discussing the *Munn* case, had this to say:

> "The true interpretation of the court's language is claimed to be that only property voluntarily devoted to a known public use is subject to regulation as to rates. But obviously Munn and Scott had not voluntarily dedicated their business (referring to their business of a public warehouseman) to a public use. They intended only to conduct it as private citizens, and they insisted that they had done nothing which gave the public an interest in their transaction or conferred any right of regulation. The statement that one has dedicated his property to a public use is, therefore, merely another way of saying that if one embarks in a business which public interest demands shall be regulated, he must know regulation will ensue."

18. 143 U.S. 517, 544.

While it is true that neither of these cases specifically characterizes public warehousemen as public utilities, nevertheless they were classified within the same general classification as common carriers, and the majority opinion of the Emergency Court of Appeals has given no weight to the reasoning and conclusions reached in those cases which we believe to be controlling in this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should issue.

Dated at San Francisco, California, June 19, 1943.

REGINALD L. VAUGHAN,
Counsel for Petitioner.

Appendix "A"

EXCERPTS TAKEN FROM HOUSE AND SENATE COMMITTEE HEARINGS AND THE CONGRESSIONAL RECORD WITH RESPECT TO THE PASSAGE OF SECTION 302(c)(2) OF THE EMERGENCY PRICE CONTROL ACT OF 1942.

Excerpts From Hearings Before the Committee on Banking and Currency of the House of Representatives, Part I, Held on August 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, September 17, 18, 22, 23, 25, 1941.

pp. 54, 55

"Mr. Henderson. * * * Now, as to the utilities. There is, as the members are aware, an adequate set of regulations as to the charges which utility companies can make. These, again, are based upon a long series of judicial determinations, of State regulations, and of State laws. It seemed to those drafting the bill that this was an area which was not likely to give difficulty or to cause, so far as they could see at that time, any inflationary trend. The bill is designed to control an emergency inflationary situation and has left them out, just as it has transportation rates. There are questions peculiar to utilities and none of them, so far as I see at the present time, would make necessary further regulation by means of price-control bill."

p. 144

"Mr. Henderson. * * * I do not regard it necessary to include in a price bill all the elements such as utility

costs, interest charges, transportation costs, personal services, but I am not unmindful that unless they are kept within bounds it would be impossible to prevent inflation."

pp. 444-445

"Mr. Crawford: Now, the British Treasury's White Book says that—

> The chancellor explained that this policy of restricting increases in prices would also be expanded to cover transportation charges, the prices of coal and gas, the electricity charges, and the prices of other articles in common use.

Now, why does this bill not consider these other items, and why do you say, on page 144, that—

> I do not regard it necessary to include in a price bill all the elements such as utility costs, interest charges, transportation costs, personal services * * *?

In other words, how can you arrive at an exact cost or ceiling price and leave out these cost elements?

Mr. Henderson. I did not mean to intimate that you should not consider them, because I think that the nature of the testimony shows that we have taken interest in all of those, and have considered them. But as to bringing them within a price-control bill, I said that transportation was under regulation already by an existing agency, that interest rates were the object of regular departmental consideration, and public utilities were under what for the time being at least seemed to be an adequate system of State regulation, and therefore did not need to be brought into review.

In England they do not have state regulation of utilities and the like.

Mr. Crawford. Is it not your understanding that in this White Paper that has been issued, the Chancelor indicates that, based upon their experience, we will say their successes and their failures in administering price controls, it was desirable now to extend their activities to cover transportation charges, the price of coal and gas, and the cost of electricity and other things in common use? In other words, I got the distinct impression that their experience now brings them to a point where they feel that they must necessarily include these elements in establishing the price ceilings or whatever they call them there.

Mr. Henderson. And I think that we would have to do the same thing in determining our price ceilings.

Mr. Crawford. And your method will be to induce, if possible, these other agencies of Government who have jurisdiction to collaborate with you to a point where those costs will be made to conform to your price?

Mr. Henderson. In general, yes; but what I said before was that I have found that every one of the agencies charged with these particular items of cost are just as earnest as we are about keeping those costs down. Take what the Maritime Commission has done recently on charter rates. I think that it relieved a very heavy burden on the cost of foreign products coming in by way of import.

Mr. Crawford. I agree with you on that. I think it helped tremendously."

p. 626

"Mr. Patman. I do not care for an extended answer, unless you think it is necessary to give it.

You include in this bill metals, chemicals, durable goods, and agricultural products, and you also include services in the bill except, of course, that it does not apply to wages and salaries paid by an employer to an employee; but otherwise services are included. But it does not include transportation or utility rates .

Mr. Henderson. No.

Mr. Patman: That is quite a large item, and you said, as I understood you, that you were satisfied with the rate-making bodies in the States, and that that was the reason you did not ask that utility and transportation rates be included.

Do I understand that correctly?

Mr. Henderson. I did not mean to limit it to existing regulatory mechanisms both in transportation and utilities.

What I said was that the transportation rates themselves were already under regulation by Federal and State agencies, and I also feel that that is not an item, even in the absence of that regulation, to be brought under commodity price regulation."

Excerpts from Hearings Held Before the Committee on Banking and Currency Before the United States Senate Held on December 9, 10, 11, 12, 15, 16 and 17, 1941.

p. 122.

"Senator Barkley. Garage Services Act? Does that include garages?

Mr. Ginsburg. Yes, sir; it includes garages; I referred, however, to the British Goods and Services Act.

Senator Brown. That is where labor is a very large factor in price.

Mr. Ginsburg. That is right.

Mr. Henderson. Warehousing.

Senator Brown. Is that in the House bill?

Mr. Henderson. Yes.

* * * *

Senator Taft. I do not object to fixing lawyers' fees, but I suppose this would permit fixing lawyers' fees?

Mr. Ginsburg. No.

Mr. Henderson. No.

Senator Taft. Why not?

Mr. Ginsburg. The lawyer does not operate a service establishment.

Senator Taft. I know. It is service rendered in connection with the processing, distributing, storage. Surely he may charge for legal services in connection with storage of stuff or legal advice as to running a warehouse. Why, certainly.

Mr. Ginsburg. When we submitted the bill to the House we said expressly it was not included. Now, if it is, then we are perfectly willing to see that it is excluded."

Excerpts From the Congressional Record

Vol. 87, No. 209, p. 9308 (November 24, 1941) House of Representatives.

"Mr. Stegall. The bill also provides explicitly in section 302(c) that nothing in the act is to be construed to authorize the regulation of compensation paid by an employer to any of his employees, or the regulation of rates charged by any common carrier, or other public

utility, which are usually subject to adequate control by State or other Federal agencies. In cases of conflict between State regulation of enterprise of a non-public-utility character and Federal regulation under this bill, the Federal regulation would, of course, prevail."

Vol. 87, No. 211, pp. 9394-9395—(November 26, 1941)—House of Representatives.

"Mr. Spence. Mr. Chairman, this is too big a question to approach it with personalities being predominant. It is a question of the greatest moment to the people of America. Irrespective of who the administrator is I do not think we should impose upon him these duties which cannot be administered by him, and which are highly technical, and which can be administered intelligently only after great study and investigation. There are commissions regulating public service corporation rates in the cities, there are commissions regulating rates in the States, and there are the various Federal regulatory commissions. All those regulatory bodies would be destroyed, they have been developed through the years, under laws which have had constant consideration and development. The lawbooks are full of decisions on the subject. All these things would be destroyed by this one section of the bill, and the judgment, the ipse dixit of one man would take their place."

Vol. 88, No. 3, p. 77—(January 7, 1942)—Senate.

"Mr. Bailey. I know that we shall have to vote for the bill. The bill will pass, and probably a great many like it. I am not raising a question about that; but does the bill authorize the Administrator to fix all prices?

Mr. Brown: I should say generally that it does. A number of classes of prices are specifically exempted, the most important of which are railroad rates, public-utility rates, prices of newspapers, and periodicals, but, generally speaking, I think we may say that the bill authorizes the Administrator to operate on all commodity prices."

Vol. 88, No. 155, pp. 7343-7346—(September 10, 1942)—Senate.

CONTROL OF UTILITY RATES AND COMMODITY PRICES

The Senate resumed the consideration of legislative business.

Mr. Norris. Mr. President, it seems to me that it is worth our while to call the attention of the country and of the Senate to what I believe to be an important and material necessity in connection with the control-of-prices program upon which the Government has engaged. We passed the price-control bill and set up a Price Administrator and gave him certain powers. In my humble opinion, he cannot successfully cope with the thousands of dilemmas and predicaments which present themselves to him, and he cannot have any effect upon the control of prices unless he is given control of all prices, including all that affect our cost of living.

In the act creating the Office of Price Administrator we specifically excluded from his control all regulation of public-utility rates, such as telephone, gas, water, and electric rates, streetcar fares, and so forth. It was natural that such an exclusion should be made because the regulation of all such rates is provided for and controlled by various boards and commissions. Yet I fear that the handicap

which that exclusion has placed upon the Price Administrator may have a disastrous effect upon his attempt to prevent runaway prices and a consequent increase in the cost of living, with resultant inflation, which all of us want to prevent.

I have a short correspondence with the Price Administrator; and I think I can best illustrate it by reading my letter to him and his reply.

On August 11 I wrote the Price Administrator as follows:

> MY DEAR MR. ADMINISTRATOR: I have given some study to the various attempts of the utility companies—gas, telephone, and electric—to increase rates and to make application in the various States to the proper commissions for such increases.
>
> These attempts have increased recently, and I understand several States in the Middle West have allowed these increases. In other States applications have been made and are now pending. My recollection is that you participated in some of the hearings on such a petition, and late in June a release was given by your office in which the public was informed that you had asked to intervene where an application for an increase of electric rates was pending before the Maine Public Utilities Commission at Bangor.
>
> I am of the opinion that these attempts to increase rates have been influenced to some extent at least by the general belief that the pending bill in Congress would increase the taxes on these utility companies. In the Maine case your petition of intervention alleged that if these rates were increased over the country indiscriminately the result would be that your work in stabilizing prices would be greatly interfered with, and that the result would be the

"hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions and scarcities caused by or contributing to the national emergency."

You alleged that such increases made because of the increased Federal taxes "would be contrary to the intention of the Congress, inflationary in character, and adversely affect the program and policies of the Office of Price Administration to stabilize prices."

I am interested in this subject because I believe that a general increase in utility rates, where it is not clearly shown that such an increase is necessary in the public interest, would not only be inflationary but would affect the program and policies of your organization and would make it practically impossible for you to stabilize prices.

The purpose of this letter is to ascertain, if possible, to what extent applications for such increases are coming in from over the country generally, and, if they are coming in, what you are doing about the matter, and what you are able to do to prevent such increases.

It seems to me this subject is very important at this time because of the pending tax bill before the Finance Committee of the Senate. It is very possible that some legislation on this subject should be included in this proposal before it is enacted into law.

Your early reply will be appreciated.

Very truly yours,

G. W. NORRIS.

On August 19 Mr. Henderson answered that letter as follows, his letter being directed to me:

I was greatly interested in your letter of August 11 on the problem of utility rates and the program of

this office and the National Government to stabilize commodity prices and the cost of living. The problem has been given special attention by this Office in recent weeks and I shall be happy to supply you with information about our activities in that field and "to aid you in ascertaining to what extent applications for such increase are coming in from over the country generally and, if they are coming in, what we are doing about the matter, and what we are able to do to prevent such increases."

As you know, the Emergency Price Control Act exempts utilities and common-carrier rates and we are without power to fix such rates and charges. Nevertheless, we have deemed it necessary to participate in rate-regulatory proceedings in our effort, not altogether unsuccessful thus far, to prevent increases in conflict with our basic program.

Let me refer briefly to some of the specific cases and problems we have recently encountered in this field. In April our attention was called to the 15-percent increase in telephone rates made by the Northwestern Bell Telephone Co. in the State of Iowa. This increase, termed a surcharge by the company, was imposed on nearly all exchange and intra-State toll service. No regulatory agency whose permission must be first obtained for such rate increase in Iowa is provided for by the laws of that State. After obtaining the technical assistance of the Federal Communications Commission, we called the company in conference and requested it to withdraw this increase as it appeared that the higher rates were imposed in large part to effect estimated higher Federal income taxes. The company agreed to this request and subsequently withdrew a request for a rate increase of about the same character pending

before the North Dakota commission, although it had earlier obtained the approval of the South Dakota commission for a similar increase in rates.

We are attempting to keep a close watch over other telephone rate increase applications in various parts of the country. The American Telephone & Telegraph Co. has furnished us with a list of all such applications which have been made by its associated companies. I am glad to say that there are now relatively few such applications pending.

A somewhat more difficult problem with respect to telephone rates is presented in connection with the rates charged by the independent telephone companies because of their large number. We recently met with the executive committee of the United States Independent Telephone Association and explained our program to them. To the extent of our ability, we propose to scrutinize their requests for increases and participate in as many cases as possible.

Because of your lifelong effort to protect the public in their relations with the electric light and power industry, you may be especially interested in our work in the electric rate field. It is true, as you suggest, we filed a petition for intervention in the Bangor Hydro-Electric rate case before the Maine Public Utility Commission. There, too, it appeared that the increase requested was because of projected higher Federal income taxes. Moreover, we were advised by certain paper companies, customers of the electric company, that if the power rate increase was approved, they would seek to have our maximum prices on paper and pulp increased. While conferences were pending with respect to the date of hearing, the company withdrew its application for an increase.

Mr. President, that illustrates how the control of public utility rates has a direct bearing on the cost of living and, therefore, on the question of inflation.

The rates we pay for water, gas, telephone, and for electric light and power are all directly and properly chargeable to the cost of living. They relate to the necessities of life. In the aggregate, spread over the country, they amount to many hundreds of millions of dollars. Yet, Mr. Henderson has no power to fix such rates. I am not complaining that he does not have the power. Later I shall ask permission to introduce a bill which I believe will cover the situation. All public-utility rates are regulated by commissions somewhere, either State or national. The Maine case illustrates how Mr. Henderson, while he had no right to reject the application made by the utility for a higher rate, did want to appear and show the Commission that if it allowed the increase requested the prices he had fixed in Maine would all be knocked into a cocked hat. While he could not fix a rate for electricity, if the Commission, which had the power to do so, should increase the rate it would put out of joint every ceiling he had made for commodities in Maine. He was informed, as he states in his letter, that the pulp company bought a great deal of electricity, and that if the rates which it had to pay for electricity in the manufacture of wood pulp for newspapers should be increased, it would have to charge more for its product, which would start an endless chain and result in inflation and ruin.

I continue with the letter:

> At the request of the Rural Electrification Administration, we participated in conferences with respect

to a proposed increase in rates for electric energy sold by an electric company to a rural cooperative. Subsequently the company withdrew its request for higher rates.

In this instance a rural electric cooperative, supplying its customers with electricity, bought its current at wholesale from a private company. The private company notified the cooperative that it would have to increase the rates. If that were done, it would probably follow that an increase of rates would take place among all the members of the cooperative organization. Hence the cost of living would climb and the danger of inflation would stare us in the face.

Mr. Henderson continues:

> Among other power rate cases now receiving our attention is the Niagara Falls Power Co. case before the New York Public Service Commission. In another, the Pennsylvania Power & Light Co. is seeking increases before the Pennsylvania Public Utilities Commission applicable to its commercial and industrial customers. We will probably seek to intervene in this case also.

At first blush one might think that Mr. Henderson should keep out, because the statute creating his office specifically states that he shall not have the power to fix utility rates. Yet he has proceeded on the theory that, even though he lacks the power, it is his duty, as he wishes to prevent inflation and to preserve the cost of living at a reasonable rate, to appear before various commissions and protest against increases in rates, because such in-

creases would put out of joint every price which he has fixed.

Mr. Henderson says further:

> Our survey of pending electric rate cases does not now indicate a large number of applications for rate increases. However, there is now an upward trend in the number of requests for rate increases before the State commissions which seems to be due primarily to efforts to shift war taxes upon the utilities to their consumers.
>
> The gas-rate problem appears to be more troublesome at this time. Among the cities where increases have recently been made or now pending are Boston, Philadelphia, Cleveland, Minneapolis, and Washington, D. C.

I call attention to Washington because I understand that yesterday certain action was taken, to which I shall refer when I finish reading this letter, and that the Public Utilities Commission of the District of Columbia will meet tomorrow to give further consideration to the subject.

I continue with the reading of the letter:

> We are now or will oppose most of these increases, particularly because they adversely affect the cost of living of practically the entire population of those cities.
>
> The relationship of taxes to utility rates is extremely important in devising and administering a proper program to control prices and the cost of living. In peacetime the principle that a utility is entitled to a fair return after allowance of all Federal income tax has been generally accepted. As an essential war measure, however, we propose to oppose the

application of this principle to any request which would contemplate an increase in rates predicated upon the allowance of anything over and above the normal Federal income tax. Higher rates predicated upon increased Federal taxes would obviously be contrary to the intention of Congress, be inflationary in character, and adversely affect our program to prevent further increases in the cost of living.

In our work in this field we have sought to cooperate with the existing regulatory agencies. Both the Federal Power and the Communications Commissions have gladly made available the advice and help of their technical experts.

I am glad to state that our right to intervene and participate seems to be readily conceded in these cases before the Federal and State utility commissions. However, one commission, that in the State of Illinois, has not yet acted upon our request for intervention. This is a proceeding involving streetcar fares in the city of Chicago. Of course we have no desire to interfere with the efforts of the State or Federal commissions under their respective statutes to reduce rates whenever found necessary.

In seeking to cooperate with the existing regulatory agencies in the utility and railroad rate fields, we are proceeding in the belief that when Congress exempted these rates from our jurisdiction, it was implied that these Commissions would recognize that the dominant principle governing the fixing of all prices in wartime would be the Government's program to stabilize commodity prices and the cost of living and that the utility and railroad rate principles must be reexamined in the light of the Government's economic program, upon the success of which depends both the winning of the war and the

peace. Their recognition of this obligation will be an important step in the success of the Government's program to prevent further increases in the cost of living.

Therefore, while I hope there will be no need for additional legislation in this field, serious consideration must be given to the practice in Canada where the consent of the price board, which administers an over-all program, as well as that of the existing regulatory authorities, is a prerequisite to utility rate increases. Certainly it should be understood without additional legislation that Federal income taxes shall be borne by those upon whom such taxes should be levied. A different policy would seriously impair, if not destroy, the basic efforts of the Government to stop inflation.

We appreciate very much your interest in this phase of our work. If we can furnish you with any additional data or information on it, please do not hesitate to call upon us.

Sincerely,

LEON HENDERSON,
Administrator.

Mr. President, Mr. Henderson mentions one place where he made an effort to prevent increasing gas rates, namely, in the city of Washington. I think it would not be unfair to say that, figuratively speaking, when Mr. Henderson's representatives appeared before the Utilities Commission here they were politely shown the door. It is true Mr. Henderson has no authority to fix gas rates in the city of Washington, but, as I have said, his representatives were there for the purpose of trying to convince the Commission that an increase in gas rates in the city of Washing-

ton meant that all the prices which he had fixed, after investigation, expense, and time, would all be knocked into a cocked hat. As I read the reports in the newspapers, I do not think that the representatives of the Price Administrator were treated with very great respect.

Mr. President, Mr. Henderson stated in his letter that he did not think that additional legislation was necessary. If he encounters cases of the kind I have mentioned, however, as he is likely to do in many places, the law will have to be changed, it seems to me, because if we are going to control the cost of living, if we are going to prevent inflation—and I believe Congress is practically unanimous in the desire to prevent it—the Price Administrator must have jurisdiction over everything that goes into the cost of living. If he does not have such jurisdiction, no matter how earnest and honest or efficiently he may try to perform the duties of his office, he will meet with failure. I think what is going on right now in this city is an illustration. I do not think he ought to have authority or jurisdiction to control gas rates specifically; but, at least, we ought to go as far as Canada has gone.

I have talked with several representative Canadians, and I understand from them that the Canadian law is working well. They said they did not see how conditions in Canada in this respect could be improved. In that country one commission has over-all jurisdiction and is given the right to say that no other commission anywhere in the Government shall increase commodity rates without its consent.

Mr. President, I have prepared a bill which I think will accomplish that result. It provides that no utility rate

shall be raised without the consent of the Price Administrator. Such a provision seems to me to be essential. If we are going to prevent inflation by the control of prices—and no one questions that that is what we are trying to do—then the man or the commission that controls prices must have jurisdiction over every price that goes into the cost of living.

Everyone knows that what the ordinary householder pays for gas or electric lights or for water goes directly into the cost of living. It cannot go anywhere else; it must go and does go there. If such rates are increased, the cost of living goes up; and if the householder is a wage earner, he has a right to say, "My cost of living has gone up; the utility companies have increased the price of gas, of water, of electric light, of streetcar fare, and I cannot live on my wages, which have been fixed." I think wages must be fixed before we can be successful in our attempt to prevent inflation; but in order that utility rates all over the country may not be increased, unless there can be a showing of absolute necessity made, somebody ought to have the right to prevent such increases, and I do not know who could better do that than the Price Administrator.

Mr. President, I have referred to the Utilities Commission in Washington, which tomorrow is going to take up the question whether or not they shall allow the gas company to increase the price of gas to practically every household in the great city of Washington. That action was not taken by unanimous vote of the Commission. The Commission consists of three men, and there was one

member who through it all stood out against any such proceeding. Regardless, however, of motives—and it may be that they are moved by motives that are perfectly honorable and honest—everybody in the great struggle in which we are now engaged must sacrifice something; the poor and the rich, the millionaire and the pauper must all sacrifice in accordance with their ability to sacrifice, and it would, it seems to me, be inviting failure in our effort to prevent inflation if the Price Administrator had no power whatever over public-utility rates, which, as everybody knows, go into the cost of living.

It will be hard, perhaps, in a great many cases, although I think in some it will be easy, for public utilities to pay increased taxes, but they must take the money out of their stockholders' profits and not out of the consumer. I think a great many of them are so patriotic that they do not want to stand in the way of preventing inflation, which Mr. Henderson is seeking to do. I believe that many of the applications for increased rates were withdrawn, as Mr. Henderson's letter indicates, because of the patriotism of the men and the corporations that had made the applications. The commissions before whom they have appeared have almost universally said, "While we can say that he does not have jurisdiction in this matter, yet our action has definite application to the question of inflation and has definite application to the prices which Mr. Henderson must fix, and the ceilings he must erect, if he is going to prevent inflation."

Therefore, it seems to me, that there ought to be a law which would give him that further jurisdiction, as a matter of prevention, and to guard against action by some

utility commission that may not be imbued by the proper spirit or may be moved to allow increases in public utility rates; which, in the most part, have been made, I think beyond question, with the idea that Congress was about to pass a tax law which would increase the taxes on everybody, and the utilities were getting ready to pass the tax on to their consumers and thus have a direct effect upon the work of the Price Administrator and often bring it to naught.

Mr. President, I ask unanimous consent, therefore, to introduce the bill which I have mentioned which provides—

> That rates charged by any common carrier or other public utility shall not be increased without the consent of the Price Administrator.
>
> * * * * *

On September 30 (legislative day, September 21), 1942, the Norris amendment was included in H. R. 7565, reading as follows:

> "Provided, That rates charged by any common carrier or other public utility on September 15, 1942, shall not be increased without the consent of the President: Provided further, That nothing in this section shall be construed as affecting the *power or authority of any Federal, State, or municipal authority or agency to reduce prices, rates or charges subject to its jurisdiction*, or to equalize the rates and charges of common carriers." (Emphasis supplied)

The Norris amendment was rejected by the Senate as shown by the Senate proceedings held on October 2, 1942, Volume 88, No. 168, pp. 7970, 7971.

> "Mr. Brown. Mr. President, section 1 of the conference report follows section 1 of the Senate bill; in

fact. I can say that very generally the conferees adopted the Senate bill with some slight modifications. The principal change in section 1 is that the Norris amendment which gave the President an all-over control of public-utility and common-carrier rates is stricken from the bill. *There is substituted for it a provision which will require any public utility which asks for an increase in rates to notify the President and to assent to the appearance of such agent as the President may designate to appear in behalf of the consuming public before the appropriate railroad or public utility commission, be it a State, Federal, or municipal commission.*

Mr. Norris. Mr. President, will the Senator yield?

Mr. Brown. I yield.

Mr. Norris. Let me ask how much notice must be given.

Mr. Brown. Thirty days' notice, as I recall, must be given to the President and consent must be filed to the appearance of the agent of the President in behalf of the *consuming* public.

Mr. Connally. Mr. President, will the Senator yield?

Mr. Brown. I yield.

Mr. Connally. *Does that also apply to railway rates, truck rates, and bus rates?*

Mr. Brown. *Yes; to all public-utility rates.*

Mr. President, let me say that in addition to what is contained in the bill, I have stated, on authority of the chairman of the Senate Banking and Currency Committee, that the committee would consider the bill which has been referred to it and which was introduced by the senior Senator from Nebraska (Mr. Norris) covering the same subject matter; and it is expected that early next week that matter may be taken up in the committee.

It was felt by the House conferees that inadequate consideration had been given to the general subject matter, and they were unwilling to accept the Senate amendment. They were unanimous in their views; and it was impossible for us to persuade them to accept the Norris amendment. However, the conferees did make the arrangement which I have indicated and which was entered into after some consultation with the senior Senator from Nebraska. We told him we thought this was the best we could get on this subject matter." (Emphasis supplied)

Appendix "B"

CHART SHOWING THE EXTENT TO WHICH THE RATES OR CHARGES OF THE CLASSES OF COMMON CARRIERS AND OTHER PUBLIC UTILITIES SHOWN ARE REGULATED BY THE SEVERAL STATES OF THE UNITED STATES.

Note: The symbol "X" is used to denote that such regulation exists. The provisions of the state laws which define these common carriers and public utilities and which subject them to such rate regulation are cited in Appendix "C" which follows.

STATE	Railroad	Common Carrier Truck (Freight)	Common Carrier Bus (Passenger)	Vessel	Express	Pipe Line	Electric	Gas	Heat	Telephone	Telegraph	Water	Wharfinger	Warehouseman
Alabama	X	X	X	X	X		X	X	X	X	X	X	X	
Arizona	X	X	X		X		X	X	X	X	X	X		
Arkansas	X	X	X	X	X	X	X	X	X	X	X	X		X[1]
California	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Colorado	X	X	X		X	X	X	X		X	X	X		
Connecticut	X	X	X		X		X	X		X	X	X		
Delaware (no regulation)														
Florida	X	X	X	X	X					X	X			
Georgia	X	X	X		X		X	X		X	X	X	X	X[2]
Idaho	X	X	X	X	X	X	X	X		X	X	X	X	X[11]
Illinois	X		X	X	X	X	X	X	X	X	X	X	X	X[3]
Indiana	X	X	X				X		X	X	X	X		X
Iowa	X	X	X		X									X[4]
Kansas	X	X	X		X	X	X	X	X	X	X	X		X[3]
Kentucky	X	X	X	X	X	X	X	X		X	X	X		
Louisiana	X	X	X	X	X	X	X	X	X	X	X	X		
Maine	X	X	X	X	X		X	X	X	X	X	X	X	X[11]
Maryland	X	X	X	X	X		X	X	X	X	X	X		
Massachusetts	X	X	X	X	X		X	X		X	X	X		
Michigan	X	X	X	X	X	X	X	X		X	X			
Minnesota	X	X	X		X					X				X
Mississippi	X	X	X		X					X	X			
Missouri	X	X	X	X	X		X	X	X	X	X	X		X[3]
Montana	X	X	X		X	X	X	X	X	X	X	X		
Nebraska	X	X	X	X	X	X				X	X	X[5]		X[3]
Nevada	X	X	X		X		X	X	X	X	X	X		X[9]
New Hampshire	X		X	X	X		X	X	X	X	X	X		
New Jersey	X		X		X	X	X	X	X	X	X	X		
New Mexico	X	X	X		X	X	X	X		X	X			
New York	X	X	X	X	X		X	X	X	X	X	X		
North Carolina	X	X	X	X	X	X	X	X	X	X	X	X		X[6]

Louisiana	X	X	X	X	X	X	X	X	X	X	X	X		
Maine	X	X	X	X	X		X	X	X	X	X	X	X	X[11]
Maryland	X	X	X	X	X		X	X	X	X	X	X		
Massachusetts	X	X	X	X	X		X	X		X	X	X		
Michigan	X	X	X	X	X	X	X	X		X	X			
Minnesota	X	X	X		X					X				X
Mississippi	X	X	X		X					X	X			
Missouri	X	X	X	X	X		X	X	X	X	X	X		X[3]
Montana	X	X	X		X	X	X	X	X	X	X	X		
Nebraska	X	X	X	X	X	X				X	X	X[5]		X[3]
Nevada	X	X	X		X		X	X	X	X	X	X		X[9]
New Hampshire	X		X	X	X		X	X	X	X	X	X		
New Jersey	X		X		X	X	X	X	X	X	X	X		
New Mexico	X	X	X		X	X	X	X		X	X			
New York	X	X	X	X	X		X	X	X	X	X	X		
North Carolina	X	X	X	X	X	X	X	X	X	X	X	X		X[6]
North Dakota	X	X	X	X	X	X	X	X	X	X	X	X		X
Ohio	X	X	X	X	X	X	X	X	X	X	X	X		
Oklahoma	X	X	X	X	X	X	X	X		X	X	X		X
Oregon	X	X	X		X		X	X	X	X	X	X		X[3]
Pennsylvania	X	X	X	X	X	X	X	X	X	X	X	X	X	
Rhode Island	X	X	X	X	X		X	X	X	X	X	X		
South Carolina	X	X	X		X		X	X	X	X	X	X		
South Dakota	X	X	X		X					X	X			X[3]
Tennessee	X	X	X		X		X	X	X	X	X	X		
Texas	X	X	X		X	X	X	X		X		X	X[9]	X[9]
Utah	X	X	X		X	X	X	X	X	X	X	X		X[11]
Vermont	X	X	X		X		X	X		X	X	X		
Virginia	X	X	X	X	X	X	X	X	X	X	X	X		
Washington	X	X	X	X	X	X	X	X		X	X	X	X	X[10]
West Virginia	X	X	X		X	X	X	X		X	X	X	X	
Wisconsin	X	X	X	X	X		X	X	X	X	X	X		X[11]
Wyoming	X	X	X		X	X	X	X	X	X	X	X		
Total States regulated	47	44	47	25	46	24	41	40	28	46	44	40	10	22
Total States unregulated	1	4	1	23	2	24	7	8	20	2	4	8	38	26

[1]Farm products warehouses only.
[2]When maintained by railroads.
[3]Grain warehouses only.
[4]Minimum rates on agricultural products in bonded warehouses only but the Iowa State Commerce Commission has power to change the minimum rates.
[5]Irrigation works only.
[6]Maximum charges of tobacco warehousemen only.
[7]Grain, cotton and broom corn warehouses only.
[8]Grain and hay warehouses only.
[9]When used in connection with railroads.
[10]In counties of 30,000 population or more, excluding certain agricultural products and cold storage products.
[11]When used in connection with common carriers.

Appendix "C"

References to the provisions of the state laws which define the common carriers and public utilities shown in Appendix "B" and which subject them to rate regulation:

Alabama

Railroad, vessel, express, telephone, telegraph—Sections 102, 104 of Title 48 of the Code of Alabama, 1940, pages 381, 382; *electric, gas, heat, water, wharfinger*—Sections 16, 17, 64, 302 of Title 48 of the Code of Alabama, 1940, pages 351, 352, 367, 492; *truck, bus*—Sections 17, 18 of the Alabama Motor Carrier Act of 1939 (General Acts of Alabama, 1939, pages 1077, 1079).

Arizona

Railroad, express, electric, gas, heat, telephone, telegraph, water—Sections 2 and 3 of Article XV of the Constitution of Arizona; *truck, bus*—Section 4 of the Motor Vehicle Code of Arizona (Chapter 100 of the Laws of Arizona; Acts of Arizona, 1933, page 474).

Arkansas

Railroad, vessel, express, pipe line—Sections 7 and 8 of the Arkansas, 1921, pages 177, 187, 188); *electric, gas, heat, telephone, telegraph, water*—Sections 1(e), 8(e), 10(a), 11, 13, 15, 16, 17, 18, 19 of the Arkansas Public Utilities Act, 1935, (Act 324, Acts of Arkansas, 1935, pages 895, 906, 912, 913, 914, 915, 917, 918, 920); *truck, bus*—Sections 16 and 17 of the Arkansas Motor Carrier Act, 1941, (Act 367, Acts of Arkansas, 1941, pages 937, 954, 959); *warehouseman*—Section 16 of the Arkansas Bonded Warehouse Act, 1935, (Act 83, Acts of Arkansas, 1935, pages 181, 192).

California

Railroad, vessel, express, pipe line, electric, gas, heat, telephone, telegraph, water, wharfinger—Sections 2, 14, 15, 63(a) of the Public Utilities Act of California (Statutes of California, 1915, Chapter 91, pages 115, 122, 124, 159); *truck*—Sections 2¾, 14,

15, 63(a) of the Public Utilities Act of California (Statutes of California, 1935, Chapter 664, page 1831; Statutes of California, 1915, Chapter 91, pages 122, 124, 159); *bus*—Sections 2¼, 14, 15, 63(a) of the Public Utilities Act of California (Statutes of California, 1927, Chapter 42, page 73; Statutes of California, 1915, Chapter 91, pages 122, 124, 159); *warehouseman*—Sections 2½, 2(aa), 14, 15, 63(a) of the Public Utilities Act of California (Statutes of California, 1927, Chapter 878, page 1919; Statutes of California, 1915, Chapter ..., pages 118, 122, 124, 159).

Colorado

Railroad, express—Sections 1(e), 14, 15, 16, 17, 18 of the Colorado Public Utilities Law (Chapter 137, 1935 Colorado Statutes Annotated, pages 492, 493, 498, 500, 501); *pipe line, electric, gas, telephone, telegraph, water*—Sections 3, 14, 15, 16, 17, 19 of the Colorado Public Utilities Law (Chapter 137, 1935 Colorado Statutes Annotated, pages 492, 494, 498, 500, 502); *truck, bus*—Sections 1(e), 14, 15, 16, 17, 18 of the Colorado Public Utilities Law (Chapter 137, 1935 Colorado Statutes Annotated, pages 492, 493, 498, 500, 501); Sections 300 to 370 of the Colorado Public Carriers Law (Chapter 16, 1935 Colorado Statutes Annotated, pages 215 to 241).

Connecticut

Railroad, express, electric, gas, telephone, telegraph, water—Section 3577 of the General Statutes of Connecticut, Revision of 1930, Volume II, page 1168, and Section 1414c of the Cumulative Supplement to General Statutes of Connecticut 1935, (Supplement to Connecticut General Statutes, January Sessions 1931, 1933, 1935, page 591); *truck*—Section 584c of the Cumulative Supplement to General Statutes of Connecticut, 1935, (Supplement to Connecticut General Statutes, January Sessions 1931, 1933, 1935, page 253); *bus*—Sections 3850, 3851 of the General Statutes of Connecticut, Revision of 1930, Volume II, page 1242.

Delaware

There is no regulation by the State of Delaware of the rates of common carriers or other public utilities.

Florida

Railroad—Sections 350.07, 350.10, 350.11, 350.12 of Title XXV, Chapter 350, of Florida Statutes, 1941; *vessel*—Sections 350.11, 350.12 of Title XXV, Chapter 350, of Florida Statutes, 1941; *express*—Sections 350.10, 350.12 of Title XXV, Chapter 350, of Florida Statutes, 1941; *telephone*—Sections 364.02-.05 of Title XXV, Chapter 350, of Florida Statutes, 1941; *telegraph*—Sections 363.01, 364.02-.05 of Title XXV, Chapter 350, of Florida Statutes, 1941; *truck, bus*—Sections 323.01(7), 323.07, 323.08 of Title XXII, Chapter 317, of Florida Statutes, 1941.

Georgia

Railroad, express, electric, gas, telephone, telegraph, wharfinger—Chapters 93-1, 93-2, 93-3, 93-4, 93-5 of the Georgia Code of 1933, pages 2434, 2437, 2445, 2450 (See particularly Chapter 93-307, page 2440); *truck, bus*—Chapter 68-6 of the Georgia Code of 1933, page 1790 (See particularly Chapter 68-613, page 1793); *warehouseman*—Chapters 93-1, 93-2, 93-3, 93-4, 93-5 of the Georgia Code of 1933, pages 2434, 2437, 2445, 2450 (See particularly Chapters 93-304, 93-307, 93-317, pages 2439, 2440, 2444); *water*—Act No. 386 of Georgia Laws, 1941, page 283.

Idaho

Railroad—Sections 59-110, 59-129, 59-301, 59-501, 59-502 of the Idaho Public Utilities Law (Idaho Code Annotated, Volume 3, pages 826, 832, 838, 858, 860); *vessel*—Sections 59-126, 59-129, 59-301, 59-501, 59-502 of the Idaho Public Utilities Law (Idaho Code Annotated, Volume 3, pages 831, 832, 838, 858, 860); *express*—Sections 59-112, 59-129, 59-301, 59-501, 59-502 of the Idaho Public Utilities Law (Idaho Code Annotated, Volume 3, pages 827, 832, 838, 858, 860); *pipe line*—Sections 59-114, 59-129, 59-301, 59-501, 59-502 of the Idaho Public Utilities Law (Idaho Code Annotated, Volume 3, pages 827, 832, 838, 858, 860); *electric*—Sections 59-118, 59-129, 59-301, 59-501, 59-502 of the Idaho Public Utilities Law (Idaho Code Annotated, Volume 3, pages 828, 832, 838, 858, 860); *gas*—Sections 59-116, 59-129, 59-301, 59-501, 59-502 of the Idaho Public Utilities Law (Idaho Code Annotated, Volume 3, pages 828, 832, 838, 858, 860); *telephone*—Sections 59-120, 59-129, 59-301, 59-501, 59-502 of the Idaho Public Utilities Law (Idaho Code Annotated,

Volume 3, pages 829, 832, 838, 858, 860); *telegraph*—Sections 59-122, 59-129, 59-301, 59-501, 59-502 of the Idaho Public Utilities Law (Idaho Code Annotated, Volume 3, pages 830, 832, 838, 858, 860); *water*—Sections 59-124, 59-129, 59-301, 59-501, 59-502 of the Idaho Public Utilities Law (Idaho Code Annotated, Volume 3, pages 830, 832, 838, 858, 860); *Wharfinger*—Sections 59-127, 59-129, 59-301, 59-501, 59-502 of the Idaho Public Utilities Law (Idaho Code Annotated, Volume 3, pages 832, 838, 858, 860); *truck, bus*—Sections 59-801, 59-807 of the Idaho Public Utilities Law (Idaho Code Annotated, Volume 3, pages 908, 912); *warehouseman*—Sections 59-128, 59-129, 59-301, 59-501, 59-502 of the Idaho Public Utilities Law (Idaho Code Annotated, Volume 3, pages 832, 838, 858, 860).

Illinois

Railroad, bus, vessel, express, pipe line, electric, gas, heat, telephone, telegraph, water, wharfinger—Sections 10, 32 to 64 of Chapter 111⅔ of the Illinois Revised Statutes, 1941, (State Bar Association Edition) pages 2497, 2503 et seq.; *warehouseman*—Sections 10, 32 to 36 of Chapter 111⅔, Section 202 of Chapter 114 of the Illinois Revised Statutes, 1941, (State Bar Association Edition) pages 2497, 2503 et seq., 2591.

Indiana

Railroad, electric, heat, telephone, telegraph, water, warehouseman—Sections 1, 7, 8, 9, 10, 12, 27, 28 of the Indiana Public Service Commission Act (Acts of Indiana, 1913, Chapter 76, pages 167 et seq.); as amended, in part, by Acts of Indiana, 1933, Chapter 190, pages 928 et seq.; Section 11 of the Indiana Public Service Commission Act (Acts of Indiana, 1913, Chapter 76, page 173); as amended by Acts of Indiana, 1925, Chapter 63, page 209; *truck, bus*—Section 2 of the Indiana Motor Vehicle Act (Acts of Indiana, 1935, Chapter 287, page 1412); as amended by Acts of Indiana 1937, Chapter 300, pages 1357 et seq. and as further amended by Acts of Indiana, 1941, Chapter 222, pages 693 et seq.; Sections 15(e), 15(g) of Indiana Motor Vehicle Act (Acts of Indiana, 1935, Chapter 287, pages 1427, 1428); as amended by Acts of Indiana, 1941, Chapter 222, pages 701, 703 which included addition of Section 15(h) at page 703;

Iowa

Railroad—Sections 8037, 8048, 8100-05 of Chapter 373 of the Code of Iowa, 1939, pages 1338, 1339, 1345, 1346; *express*—Sections 8236, 8237 of Chapter 380 of the Code of Iowa, 1939, page 1365; *warehouseman*—Sections 9751.01, 9751.18(5) of Chapter 426 of the Code of Iowa, 1939, pages 1595, 1598; *truck, bus*—Sections 5100.01, 5100.02, 5100.04, 5100.05, 5105.02 of Chapter 252.1 of the Code of Iowa, 1939, pages 864, 869.

Kansas

Railroad, express—Sections 66-105, 66-107, 66-110 et. seq. of Chapter 66 of the General Statutes of Kansas, 1935, pages 1549, 1550 et seq.; *pipe line*—Sections 66-105, 66-107, 66-110 et seq. of Chapter 66 of the General Statutes of Kansas, 1935, pages 1549, 1550 et seq.; Sections 55-503, 55-504 of Chapter 55 of the General Statutes of Kansas, 1935, page 1184; *electric, gas, heat, telephone, telegraph, water*—Sections 66-104, 66-107, 66-110 et seq. of Chapter 66 of the General Statutes of Kansas, 1935, pages 1548, 1549, 1550 et seq.; *truck, bus*—Sections 66-1108, 66-1110, 66-1112 of Chapter 66 of the General Statutes of Kansas, 1935, pages 1572, 1573; *warehouseman*—Sections 34-224, 34-225, 34-235 of Chapter 34 of the General Statutes of Kansas, 1935, pages 890, 892.

Kentucky

Railroad, vessel, express—Sections 201e-1, 201e-5 of Chapter 13a of the Kentucky Revised Statutes (Baldwin's 1936 Revision), pages 131, 132; *pipe line, electric, gas, telephone, telegraph, water*—Sections 3952-1, 3952-14 of Chapter 104a of the Kentucky Revised Statutes (Baldwin's 1936 Revision), pages 2076, 2079; *truck, bus*—Sections 2739j-1, 2739j-9, 2739j-10, 2739j-42, 2739j-56, 2739j-60 of Article VII of the Kentucky Revised Statutes (Baldwin's 1936 Revision), pages 1448, 1456, 1457, 1459, 1460.

Louisiana

Railroad, vessel—Sections 4, 5 of Article VI of the Louisiana Constitution of 1921 (Dart's 1932 Annotated Edition; pages 99, 102); Section 1 of Act No. 24 of the Acts of Louisiana, 1904, page 28; *express, telephone, telegraph*—Sections 4, 5 of Article

VI of the Louisiana Constitution of 1921 (Dart's 1932 Annotated Edition, pages 99, 102); Section 2 of Act No. 24 of Acts of Louisiana, 1904, page 28; *pipe line*—Sections 4, 5 of Article VI of the Louisiana Constitution of 1921 (Dart's 1932 Annotated Edition, pages 99, 102); *electric, gas, heat, water*—Sections 4, 5 of Article VI of the Louisiana Constitution of 1921 (Dart's 1932 Annotated Edition, pages 99, 102); Section 1 of Act No. 19 of the Acts of Louisiana, 1934, 2nd Extraordinary Session, page 110; *truck, bus*—Sections 2(j), 4 of Act No. 301 of the Acts of Louisiana, 1938, pages 774, 776.

Maine

Railroad, vessel, express, electric, gas, telephone, telegraph, water, wharfinger, warehouseman—Sections 15, 16, 33, 51 et seq. of Chapter 62 of the Revised Statutes of Maine, 1930, pages 1029, 1032, 1034, 1042 et seq.; *heat*—Section 1 of Chapter 126 of the Laws of Maine, 1931, page 98; Sections 16, 33, 51 et seq. of Chapter 62 of the Revised Statutes of Maine, 1930, pages 1032, 1034, 1042 et seq.; *truck*—Sections 2, 4 of Chapter 259 of the Laws of Maine, 1933, pages 429, 431; *bus*—Sections 1, 2 of Chapter 66 of the Revised Statutes of Maine, 1930, page 1099.

Maryland

Railroad, vessel, express—Sections 344, 368, 371, 372, 381, 382 of Article 23 of the Annotated Code of Maryland, 1939 (Flack Edition), pages 932, 950, 953, 960, 962; *electric, gas*—Sections 344, 345, 371, 372, 398, 407, 409 of Article 23 of the Annotated Code of Maryland, 1939 (Flack Edition) pages 932, 936, 953, 972, 979, 981; *heat*—Sections 344, 371, 372, 413 of Article 23 of the Annotated Code of Maryland, 1939 (Flack Edition), pages 932, 953, 983; *telephone*—Sections 305, 344, 371, 372, 411, 412 of Article 23 of the Annotated Code of Maryland, 1939 (Flack Edition), pages 917, 932, 953, 982, 983; *telegraph*—Sections 344, 371, 372, 411, 412 of Article 23 of the Annotated Code of Maryland, 1939 (Flack Edition), pages 932, 953, 982, 983; *water*—Sections 344, 371, 372, 413, 414 of Article 23 of the Annotated Code of Maryland, 1939 (Flack Edition), pages 932, 953, 983, 984; *truck*—Sections 345, 371, 372, 381, 382 of Article 23 of the Annotated Code of Maryland, 1939 (Flack Edition), pages 932, 953, 960, 962; Section 315

of Article 56 of the Annotated Code of Maryland, 1939 (Flack Edition), page 2436; *bus*—Sections 345, 371, 372, 381, 382 of Article 23 of the Annotated Code of Maryland, 1939 (Flack Edition), pages 932, 953, 960, 962; Section 304 of Article 56 of the Annotated Code of Maryland, 1939 (Flack Edition), page 2428.

Massachusetts

Railroad, vessel, express, telephone, telegraph—Sections 12, 13, 14 of Chapter 159 of the General Laws of Massachusetts, 1932, page 1992; *electric, gas*—Sections 1, 93, 94 of Chapter 164 of the General Laws of Massachusetts, 1932, pages 2134, 2159; *water*—Sections 1, 2 (by reference to Sections 93, 94 of Chapter 164) of Chapter 165 of the General Laws of Massachusetts, 1932, page 2169; *truck*—Sections 1, 2 of Chapter 159B of the General Laws of Massachusetts (Acts and Resolves of Massachusetts, 1934, pages 318, 319); *bus*—Sections 12, 13, 14 of Chapter 159 and Section 1 of Chapter 159A of the General Laws of Massachusetts, 1932, pages 1992, 2018.

Michigan

Railroad, express—Sections 3, 10, 22 of Act No. 300 of the Public Acts of Michigan, 1909, pages 707, 713, 719; Section 6 of Act No. 3 of the Public Acts of Michigan, 1939, page 10; *vessel*—Sections 1, 4 of Act No. 246 of the Public Acts of Michigan, 1921, pages 459, 460; Section 6 of Act No. 3 of the Public Acts of Michigan, 1939, page 10; *pipe line, electric, gas, telephone, telegraph*—Section 6 of Act No. 3 of the Public Acts of Michigan, 1939, page 10; *truck, bus*—Sections 1, 10 of Act No. 254 of the Public Acts of Michigan, 1933, pages 411, 416; Section 6 of Act No. 3 of the Public Acts of Michigan, 1939, page 10.

Minnesota

Railroad, express—Sections 4628, 4767, 4769, 4771 et seq. of Mason's Minnesota Statutes of 1927, pages 1020, 1037, 1038; *telephone*—Sections 5286, 5289, 5290, 5291 of Mason's Minnesota Statutes of 1927, pages 1104, 1105; *truck, bus*—Sections 5015-2(*l*), 5015-4 of Mason's Minnesota Statutes of 1927, page 1071; *warehouseman*—Sections 4628, 5084, 5172, 5173, 5188 of Mason's Minnesota Statutes of 1927, pages 1020, 1083, 1091,

1092, 1093; Section 5173 of Mason's Minnesota Statutes of 1927; as amended by Chapter 139 of the Laws of Minnesota, 1941, page 185.

Mississippi

Railroad—Sections 7046, 7056, 7095 of the Mississippi Code Annotated, 1930, Volume 2, pages 2832, 2834, 2848; *express, telephone, telegraph*—Sections 7046, 7056, 7096 of the Mississippi Code Annotated, 1930, Volume 2, pages 2832, 2834, 2850; *truck, bus*—Sections 3(e), 14, 15 of the Mississippi Motor Carrier Regulatory Act 1938 (General Laws of Mississippi, 1938, pages 188, 198, 201).

Missouri

Railroad—Sections 5122.6, 5167 of the Missouri Public Service Commission Law (Chapter 33 of the Revised Statutes of Missouri, 1929, pages 1411, 1430); *vessel, express*—Sections 5122.9, 5122.23, 5167 of the Missouri Public Service Commission Law (Chapter 33 of the Revised Statutes of Missouri, 1929, pages 1411, 1412, 1430); *electric*—Sections 5122.13, 5189 of the Missouri Public Service Commission Law (Chapter 33 of the Revised Statutes of Missouri, 1929, pages 1411, 1444); *gas*—Sections 5122.11, 5189 of the Missouri Public Service Commission Law (Chapter 33 of the Revised Statutes of Missouri, 1929, pages 1411, 1444); *heat*—Sections 5122.25, 5228 of the Missouri Public Service Commission Law (Chapter 33 of the Revised Statutes of Missouri, 1929, pages 1412, 1470); *telephone*—Sections 5122.17, 5208 of the Missouri Public Service Commission Law (Chapter 33 of the Revised Statutes of Missouri, 1929, pages 1412, 1458); *telegraph*—Sections 5122.19, 5208 of the Missouri Public Service Commission Law (Chapter 33 of the Revised Statutes of Missouri, 1929, pages 1412, 1458); *water*—Sections 5122.21, 5189 of the Missouri Public Service Commission Law (Chapter 33 of the Revised Statutes of Missouri, 1929, pages 1412, 1444); *warehouseman*—Section 14685.24 of the Missouri Revised Statutes Annotated, Laws of 1941, page 677 (Laws of Missouri, 1941, page 384); *truck, bus*—Sections 5264(b), 5267 of the Missouri Public Service Commission Law (Laws of Missouri, 1931, page 304; 1935, page 321).

Montana

Railroad, express—Sections 3792, 3793, 3794, 3797 of Chapter 309 of the Revised Code of Montana, 1935, pages 659, 662; *pipe line*—Sections 3848, 3851 of Chapter 311 of Revised Code of Montana, 1935, pages 692, 694; *electric, gas, heat, telephone, telegraph, water*—Sections 3881, 3883, 3897 et seq. of Chapter 313 of the Revised Code of Montana, 1935, pages 705, 706, 712 et seq.; *truck, bus*—Sections 3847.1(h), 3847.3 of Chapter 310 of the Revised Code of Montana, 1935, pages 680, 682.

Nebraska

Railroad, vessel, pipe line, telephone—Section 20 of Article IV of the Constitution of Nebraska (Compiled Statutes of Nebraska, 1929, page 45); Sections 75-201, 75-203 of Chapter 75 of the Compiled Statutes of Nebraska, 1929, pages 1425, 1426; *express*—Section 20 of Article IV of the Constitution of Nebraska (Compiled Statutes of Nebraska, 1929, page 45); Sections 75-201, 75-203 of Chapter 75 of the Compiled Statutes of Nebraska, 1929, pages 1425, 1426; Sections 86-501 et seq. of the Compiled Statutes of Nebraska, 1929, pages 1757 et seq.; *telegraph*—Sections 86-101, 86-114, 86-115 of Chapter 86 of the Compiled Statutes of Nebraska, 1929, pages 1748, 1750; *water*—Section 46-627 of Chapter 46 of the Compiled Statutes of Nebraska, 1929, page 1136 *warehouseman*—Sections 88-219, 88-226 of Chapter 88 of the Compiled Statutes of Nebraska, 1941 Supplement, pages 890, 891; *truck, bus*—Sections 75-223(i), 75-234, 75-236 of Chapter 75 of the Compiled Statutes of Nebraska, 1937 Supplement, pages 530, 532, 533.

Nevada

Railroad, express, electric, gas, heat, telephone, telegraph, water—Sections 7, 9, 17 of the Nevada Public Service Commission Law (Statutes of Nevada, 1919, pages 200, 201, 205); as amended by Statutes of Nevada, 1928, page 58; *truck, bus*—Sections 7, 9, 17 of the Nevada Public Service Commission Law (Statutes of Nevada, 1919, pages 200, 201, 205); as amended by Statutes of Nevada, 1928, page 58; Sections 2, 5, 6 of the Nevada Motor Vehicle Carrier Regulation and Licensing Act (Statutes of Nevada, 1933, pages 218, 219, 220); *warehouseman*—Section 6106 of the Public Service Commission Act of Nevada (Hillyer's Nevada Compiled Laws of 1929, Volume 3, page 1733).

New Hampshire

Railroad, vessel, express—Sections 2, 3 of Chapter 236; 3 et seq. of Chapter 242 of Public Laws of New Hampshire, 1926, pages 919, 920, 947 et seq.; *electric, gas, heat, telephone, telegraph, water*—Sections 4 of Chapter 236; 3 et seq. of Chapter 242 of the Public Laws of New Hampshire, 1926, pages 920, 947 et seq.; Sections 1, 2 of Chapter 148 of New Hampshire Laws, 1941, page 222; *bus*—Sections 2-IV, 14, 16 of the New Hampshire Motor Carrier Act (New Hampshire Laws, 1941, Chapter 224, pages 430, 436).

New Jersey

Railroad, bus, express, pipe line, electric, gas, heat, telephone, telegraph, water—Sections 48:2-13, 48:2-21 of Title 48 of the Revised Statutes of New Jersey, 1937, Volume II.

New Mexico

Railroad, express, telegraph—Section 7 of Article XI of the Constitution of New Mexico (New Mexico Statutes Annotated, Compilation of 1929; page 126); *pipe line*—Section 7 of Article XI of the Constitution of New Mexico (New Mexico Statutes Annotated, Compilation of 1929, page 126); Section 104-102 of New Mexico Statutes Annotated, Compilation of 1929, page 1305; *electric, gas*—Sections 90-2201, 90-2207 of Chapter 90 of New Mexico Statutes Annotated, Compilation of 1929, pages 1217, 1218; *telephone*—Section 7 of Article XI of the Constitution of New Mexico (New Mexico Statutes Annotated, Compilation of 1929, page 126); Sections 90-2201, 90-2207 of Chapter 90 of New Mexico Statutes Annotated, Compilation of 1929, pages 1217, 1218; *truck, bus*—Sections 11-1001(d), 11-1002 of Chapter 11 of New Mexico Statutes Annotated, Compilation of 1929, page 304.

New York

Railroad, vessel, express—Sections 2, 5, 26 et seq., 49 of the Public Service Laws of New York (Thompson's Laws of New York, 1939, Part II, pages 140, 144, 149 et seq., 155); *electric, gas*—Sections 2, 5, 65, 66, 71 et seq. of the Public Service Laws of New York (Thompson's Laws of New York, 1939, Part II, pages 140, 144, 178, 184 et seq.); *heat*—Sections 2, 5, 79, 80,

84 et seq. of the Public Service Laws of New York (Thompson's Laws of New York, 1939, Part II, pages 140, 144, 185, 186, 189 et seq.); *telephone, telegraph*—Sections 2, 5, 91, 92, 97 of the Public Service Laws of New York (Thompson's Laws of New York, 1939, Part II, pages 140, 144, 197, 200); *water*—Sections 2, 5, 89-b, 89-c, 89-i et seq. of the Public Service Laws of New York (Thompson's Laws of New York, 1939, Part II, pages 140, 144, 191, 195 et seq.); *truck*—Sections 2, 5, 63-s of the Public Service Laws of New York (Thompson's Laws of New York, 1939, Part II, pages 140, 144, 174); *bus*—Sections 2, 5, 60-a, 61 of the Public Service Laws of New York (Thompson's Laws of New York, 1939, Part II, pages 140, 144, 163, 164).

North Carolina

Railroad, vessel, express—Sections 1035, 1066 of Chapter 21 of the North Carolina Code of 1939, Annotated, pages 488, 496; as amended by Chapter 97 of the Public Laws of North Carolina, session 1941, page 151; *pipe line, heat*—Sections 1112(1), 1112(4) et seq. of the North Carolina Code of 1939, Annotated, pages 513, 514 et seq.; as amended by Chapter 97 of the Public Laws of North Carolina, Session 1941, page 151; *electric, gas, telephone, telegraph*—Sections 1035, 1066, 1112(1), 1112(4) et seq. of the North Carolina Code of 1939, Annotated, pages 488, 496, 513, 514 et seq.; as amended by Chapter 97 of the Public Laws of North Carolina, Session 1941, page 151; *water*—Sections 1035, 1112(1), 1112(4) et seq. of the North Carolina Code of 1939, Annotated, pages 488, 513, 514 et seq.; as amended by Chapter 97 of the Public Laws of North Carolina, Session 1941, page 151; *warehouseman*—Section 5124 of the Consolidated Statutes of North Carolina, Annotated, 1919, Volume Two, page 1331 (Section 5124 of North Carolina Code of 1939, Annotated, page 1923); as amended by Chapter 291 of Public Laws of North Carolina Session 1941, page 421; *truck, bus*—Sections 1112(1), 1112(4) et seq. of the North Carlina Code of 1939, Annotated, pages 513, 514 et seq.; Sections 2613(j), 2613(p), 2613(v) of Chapter 55 of the North Carolina Code of 1939, Annotated, pages 1126, 1129, 1132; as amended by Chapter 97 of the Public Laws of North Carolina, Session 1941, page 151.

North Dakota

Railroad, vessel, express, pipe line, electric, gas, heat, telephone, telegraph, water—Sections 4609c-2, 4609c-3, 4609c-4, 4609c-14, 4609c-37 of the 1925 Supplement to the 1913 Compiled Laws of North Dakota, Annotated, pages 956, 957, 958, 962, 969, as amended; *warehouseman*—Sections 4609c-2, 4609c-3, 4609c-4, 4609c-14, 4609c-37 of the 1925 Supplement to the 1913 Compiled Laws of North Dakota, Annotated, pages 956, 957, 958, 962, 969, as amended; Chapter 227 of the Laws of North Dakota, 1931, page 397; *truck, bus*—Sections 1, 6 of Chapter 164 of the Laws of North Dakota, 1933, pages 245, 246; as amended by Chapter 197 of the Laws of North Dakota, 1941, page 295.

Ohio

Railroad, vessel, express—Sections 501, 508, 527, 614-2, 614-2(a), 614-2(o) of Page's Ohio General Code, Annotated, Volume 1, pages 245, 253, 258, 285, 287, 295; as amended—See Page's Ohio General Code, Annotated, Spring 1942 Supplement, pages 45, 46; *pipe line, electric, gas, heat, telephone, telegraph, water*—Sections 614-2, 614-2(o) of Page's Ohio General Code, Annotated, Volume 1, pages 285, 295; as amended—See Page's Ohio General Code, Annotated, Spring 1942 Supplement, pages 45, 46; *truck, bus*—Sections 614-2, 614-2(o), 614-84, 614-86 of Page's Ohio General Code, Annotated, Volume 1, pages 285, 295, 319, 321; as amended—See Page's Ohio General Code, Annotated, Spring 1942 Supplement, pages 45, 46, 47, 48.

Oklahoma

Railroad—Sections 17, 18 of Article IX of the Oklahoma Constitution; Section 71 of Title 17 of the Oklahoma Statutes, 1941, pages 70, 691; *vessel, express, telephone, telegraph*—Sections 17, 18 of Article IX of the Oklahoma Constitution (Oklahoma Statutes, 1941, page 70); *pipe line*—Sections 17, 18 of Article IX of the Oklahoma Constitution (Oklahoma Statutes, 1941, page 70); Sections 151, 152 of Title 17 of the Oklahoma Statutes, 1941, page 697; *electric, gas, water*—Sections 151, 152 of Title 17 of the Oklahoma Statutes, 1941, page 697; *truck, bus*—Sections 161, 162 of Title 47 of the Oklahoma Statutes.

1941, pages 1513, 1514; *warehouseman*—Sections 1, 13, 141, 149 of Title 81 of the Oklahoma Statutes, 1941, pages 2580, 2582, 2590, 2591.

Oregon

Railroad, express—Sections 113-102, 113-111 et seq. of Oregon Compiled Laws Annotated, Volume 8, pages 482, 490 et seq.; as amended—See Oregon Compiled Laws Annotated, 1941 Annual Pocket Part for Volume 8, page 34; *electric, gas, heat, telephone, telegraph, water*—Sections 112-401, 112-425, 112-429 et seq., 112-4134 of the Oregon Compiled Laws Annotated, Volume 8, pages 401, 413, 415 et seq., 457; *truck, bus*—Sections 115-502, 115-506 of the Oregon Compiled Laws Annotated, Volume 8, pages 809, 817; as amended—See Oregon Compiled Laws Annotated, 1941 Annual Pocket Part for Volume 8, page 74; *warehouseman*—Sections 60-301, 60-306 of the Oregon Compiled Laws Annotated, Volume 4, pages 1149, 1151.

Pennsylvania

Railroad, vessel, express—Sections 1102(5), 1102(17), 1102(18), 1141, 1148, 1149 et seq. of Title 66 of Purdon's Pennsylvania Statutes Annotated (Titles 62-66), pages 562, 565, 596, 610, 615, et seq.; *pipe line, electric, gas, heat, telephone, telegraph, water, wharfinger*—Sections 1102(17), 1141, 1148, 1149 et seq. of Title 66 of Purdon's Pennsylvania Statutes Annotated (Titles 62-66), pages 596, 610, 615 et seq.; *truck, bus*—Sections 1102(5), 1102(6), 1141, 1148, 1149 et seq. of Title 66 of Purdon's Pennsylvania Statutes Annotated (Titles 62-66), pages 562, 563, 596, 610, 615 et seq.; as amended—See Purdon's Pennsylvania Statutes Annotated (Titles 62-66), 1941 Cumulative Annual Pocket Part, page 24.

Rhode Island

Railroad, vessel, express, electric, gas, heat, telephone, telegraph, water—Sections 2, 15 et seq. of Chapter 122 of the General Laws of Rhode Island, 1938, pages 288, 289 et seq.; *truck*—Sections 3 of Article II and 3 of Article III of Chapter 199 of the General Laws of Rhode Island, 1938, pages 230, 231; *bus*—Sections 1, 2 of Chapter 125 of the General Laws of Rhode Island, 1938, page 304.

South Carolina

Railroad—Sections 8288, 8304 et seq. of the Code of Laws of South Carolina, 1932, Volume III, pages 875, 881 et seq.; Act No. 18 of the Acts of South Carolina, 1935, page 25; Acts of South Carolina, 1937, page 1471; *express*—Section 8542 of the Code of Laws of South Carolina, 1932, Volume III, page 969; Act No. 18 of the Acts of South Carolina, 1935, page 25; Acts of South Carolina, 1937, page 1471; *electric, gas, heat, water*—Sections 8248, 8252 of the Code of Laws of South Carolina, 1932, Volume III, pages 862, 863; as amended by Statutes at Large of South Carolina, 1937, pages 1471, 1493; Act No. 18 of the Acts of South Carolina, 1935, page 25; *telephone*—Section 8541 of the Code of Laws of South Carolina, 1932, Volume III, page 968; Acts of South Carolina, 1937, page 1471; *telegraph*—Sections 8541, 8542 of the Code of Laws of South Carolina, 1932, Volume III, pages 968, 969; Acts of South Carolina, 1937, page 1471; *truck, bus*—Sections 8507, 8516 of the Code of Laws of South Carolina, 1932, Volume III, pages 954, 960.

South Dakota

Railroad—Sections 52.0201, 52.0216 of Title 52 of the South Dakota Code of 1939, Volume 3, pages 491, 498; *express*—Sections 52.0201, 52.0216, 52.1401, 52.1403 of Title 52 of the South Dakota Code of 1939, Volume 3, pages 491, 498, 566; *telephone, telegraph*—Sections 52.0201, 52.0216, 52.0260 of Title 52 of the South Dakota Code of 1939, Volume 3, pages 491, 498, 512; *truck, bus*—Sections 44.0401, 44.0403 of Title 44 of the South Dakota Code of 1939, Volume 3, pages 212, 214; *warehouseman*—Sections 60.0303, 60.0311 of Title 60 of the South Dakota Code of 1939, Volume 3, pages 1083, 1085.

Tennessee

Railroad—Section's 5397, 5415 of Michie's Tennessee Code of 1938, Annotated, pages 810, 812; *express, electric, gas, heat, telephone, telegraph, water*—Sections 5448, 5450 of Michie's Tennessee Code of 1938, Annotated, pages 817, 818; *truck, bus*—Sections 1166(3), 5501(1), 5501(4) of Michie's Tennessee Code of 1938, Annotated, pages 822, 823.

Texas

Railroad, wharfinger, warehouseman—Article 6445 of Vernon's Texas Statutes, 1936, page 1183; *express*—Articles 3860, 3861 of Vernon's Texas Statutes, 1936, page 757; *pipe line*—Article 6049a, Sections 1, 6(a), of Vernon's Texas Statutes, 1936, pages 1099, 1100; *electric, telephone, water*—Articles 1125, 1131 of Vernon's Texas Statutes, 1936, pages 281, 282; *gas*—Articles 6050, 6053 of Vernon's Texas Statutes, 1936, pages 1107, 1108; Articles 1125, 1131 of Vernon's Texas Statutes, 1936, pages 281, 282; *truck*—Article 911b, Sections 1(g), 4(a) of Vernon's Texas Statutes, 1936, page 231; *bus*—Article 911a, Sections 1(c), 4(a) of Vernon's Texas Statutes, 1936, page 227.

Utah

Railroad, express, electric, gas, heat, telephone, telegraph, water, warehouseman—Sections 76-2-1, 76-6-12 of Title 76 of the Revised Statutes of Utah, 1933, pages 811, 831; as amended by Section 76-1-3b of Title 76 of the Utah Revised Statutes Supplement, 1939, page 401; *truck, bus*—Sections 76-5-1, 76-5-3, 76-5-5 of Title 76 of the Utah Revised Statutes Supplement, 1939, pages 404, 405.

Vermont

Railroad—Section 6009 of Chapter 244 of the Public Laws of Vermont, 1933 (Proposed Revision), p. 886; *express, electric, gas, telephone, telegraph, water, truck, bus*—Sections 5760, 5765, 5766, 5767 of the Public Laws of Vermont, 1933 (Proposed Revision), pages 847, 848, 849.

Virginia

Railroad, vessel, express—Section 156(b) of the Constitution of Virginia; Sections 3881, 3908, 3909 of the Virginia Code of 1936, Annotated, pages 2371, 1128, 1138; *pipe line*—Sections 3881, 4071 of the Virginia Code of 1936, Annotated, pages 1128, 1182; *electric, gas, heat, water*—Sections 3881, 4067, 4071 of the Virginia Code of 1936, Annotated, pages 1128, 1182; *telephone*—Section 156(b) of the Constitution of Virginia; Sections 3881, 4052, 4067, 4071 of the Virginia Code of 1936, Annotated, pages 2371, 1128, 1174, 1182; *telegraph*—

Section 156(b) of the Constitution of Virginia; Section 3881 of the Virginia Code of 1936, Annotated, pages 2371, 1128; *truck, bus*—Sections 4097m, 4097y(1), 4097y(4) of the Virginia Code of 1936, Annotated, pages 1194, 1201, 1202; as amended by Section 4097y(1) of the 1940 Cumulative Supplement to the Virginia Code of 1936, Annotated, page 333.

Washington

Railroad, vessel, express—Sections 10344, 10350 et seq. of Remington's Revised Statutes of Washington, Annotated, Volume 11, pages 20, 28 et seq.; *pipe line*—Section 9965 of Remington's Revised Statutes of Washington, Annotated, Volume 10, page 661; Section 9965-1 of Remington's Revised Statutes of Washington, 1940 Annual Pocket Part for Volume 10, page 249; *electric, gas, water*—Sections 10344, 10362, 10390 of Remington's Revised Statutes of Washington, Annotated, Volume 11, pages 20, 43, 59; *telephone, telegraph*—Sections 10344, 10371, 10391 of Remington's Revised Statutes of Washington, Annotated, Volume 11, pages 20, 49, 61; *truck*—Sections 6382, 6382-11a of Remington's Revised Statutes of Washington, Annotated, Volume 7A, pages 250, 256; as amended by Section 6382-11a of Remington's Revised Statutes of Washington, Annotated, 1941 Supplement, page 216; *bus*—Sections 6387, 6389 of Remington's Revised Statutes of Washington, 1940 Annual Pocket Part for Volume 7A, pages 23, 26; *wharfinger*—Sections 10344, 10392 of Remington's Revised Statutes of Washington, Annotated, Volume 11, pages 20, 63; *warehouseman*—Sections 10344, 10392 of Remington's Revised Statutes of Washington, Annotated, Volume 11, pages 20, 63; Sections 11569-1, 11569-4 of Remington's Revised Statutes of Washington, 1940 Annual Pocket Part, for Volume 11, pages 271, 274.

West Virginia

Railroad, express, pipe line, electric, gas, telephone, telegraph, water, wharfinger—Sections 2553(1), 2555(3) of West Virginia Code of 1937, Annotated, pages 884, 886; *truck, bus*—Sections 2577(2)[2], 2577(6)[3] of West Virginia Code of 1937, Annotated, page 898; as amended by Section 2577(2)[2] of 1941 Cumulative Supplement to the West Virginia Code of 1937, Annotated, page 250.

Wisconsin

Railroad, vessel, express, telegraph, warehouseman—Sections 195.02, 195.05, 195.08 of Wisconsin Statutes, 1937, pages 2002, 2005, 2006; *electric, gas, heat, telephone, water*—Sections 196.01, 196.37 of Wisconsin Statutes, 1937, pages 2015, 2023; *truck, bus*—Sections 194.01, 194.18 of Wisconsin Statutes, 1937, pages 1990, 1994.

Wyoming

Railroad, express, pipe line, electric, gas, heat, telephone, telegraph, water—Sections 94-101, 94-120 of Chapter 94 of the Wyoming Revised Statutes, 1931, pages 1621, 1623; *truck, bus*—Sections 2, 8 of Chapter 65 of the Session Laws of Wyoming, 1935, pages 63, 66.

FILE COPY

SUPRE

Subject Index

	Page
Preliminary Statement	1
Argument	3
A. Reply to Respondent's Argument That the Exemption in Section 302(e)(2) Is Analogous to Exemptions Contained in Taxing Acts	3
B. Reply to Respondent's Contention That Section 302(e)(2) Was Properly Construed So as to Be of Uniform Meaning Throughout the United States	4
C. Reply to Respondent's Argument That It Was Not Intended to Make the Scope of the Administrator's Authority Dependent Upon the Non-Existence of State Rate Control	8
D. Reply to Respondent's Discussion Regarding Legislative History of the Exemption Clause	9
E. Reply to Respondent's Argument That the Legislative Repetition of the Phrase "Common Carrier or Other Public Utility" Is Persuasive Indication of Congressional Approval of the Existing Administrative Construction	10
F. Reply to Respondent's Contention That the Interpretation of the Exemption Provision by the Court Below Avoids Several Consequences Inimical to Effective Price Control	12
G. Reply to Respondent's Argument That the Public Warehousing Business Is Covered by the Act Because, Under Section 302(c) Thereof the Term Commodity Includes Services Rendered in Connection With the Storage of a Commodity	14
H. Reply to Respondent's Contention That a Good Indication of the Common Understanding of the Term "Public Utility" May Be Found in the Use Made of It Generally by the State Legislatures	16

Page

I. Reply to Respondent's Argument That the Term "Public Utility" Is Limited in Its Scope to Common Carriers and to Such Utilities as Electric, Gas, Telephone, Telegraph, Water and Heat Utilities 20

J. Reply to Respondent's Contention That the Administrator's Interpretation of the Act Is Entitled to Great Weight 25

K. Reply to Respondent's Contention That the Affirmance of His Interpretation by the Emergency Court of Appeals Is Sufficient to Settle the Controverted Question 28

Conclusion 29

Appendix "A" i

Table of Authorities Cited

Cases

	Pages
Bank of Commerce v. Tennessee, 161 U.S. 134, 146	4
Budd v. State of New York, 143 U.S. 517	21
Frost v. Corporation Commission of Oklahoma, 278 U.S. 515	22
Jerome v. United States, 318 U.S. 101	5
Lyeth v. Hoey, 305 U.S. 188	5
Munn v. Illinois, 94 U.S. 113	17, 18, 19, 20, 23
Nebbia v. New York, 291 U.S. 502	17, 18, 19, 20
Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294, 315	25
Ozawa v. United States, 260 U.S. 178, 194	4
Pulitzer Publishing Company v. Federal Communications Commission, 94 Fed.(2d) (App. D.C.) 249, 251	21
United States v. American Trucking Associations, Inc., 310 U.S. 534, 549	25
United States v. Stewart, 311 U.S. 60, 71	4

Statutes

California Public Utilities Act, Section 2(aa), California Statutes 1915, p. 118	24
Code of Iowa (1939), Section 6143, Chapter 312, p. 1025	3
Communications Act of 1934: Act June 19, 1934, C. 652, §§1 et seq., 48 Stat. 1064 et seq., as amended; 47 U.S.C.A. §§151 et seq	3
Deering's General Laws of California (1937) Volume Two, p. 3124	24

Pages

Emergency Price Control Act of 1942:
Act Jan. 30, 1942, C. 26; 56 Stat. 23; 50 U.S.C.A. App. §§901 et seq.:
Section 302(c) 14, 15
Section 302(c)(2) 2, 8, 27

Federal Power Act:
Act June 10, 1920, C. 285, §320, added Aug. 26, 1935, C. 687, Title II, §213, 49 Stat. 863, 16 U.S.C.A. §§791a et seq. 2

Idaho Code Annotated (1932), Section 59-128, Vol. 3, p. 832 24
Inflation Control Act of 1942:
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Act Feb. 4, 1887, C. 104, 24 Stat. 379; 49 U.S.C.A. §§1 et seq. 2
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Act Sept. 18, 1940, C. 722, Title II §201, 54 Stat. 929; 49 U.S.C.A. §§901 et seq. 2

Maine Revised Statutes (1930); Section 15, p. 1029 24

United States Warehouse Act, C. 313, 39 Stat. 486, et seq. 7 U.S.C. §§241-273 24

Vernon's Texas Statutes (1936), Article 6445, p. 1183 24

Wisconsin Statutes (1937), Section 195.02, p. 2002 24

TEXTS

Encyclopaedia Americana, Vol. 22, pp. 778-779 23
Encyclopaedia Britannica:
Vol. 18, p. 745 22
Vol. 18, p. 746 20

Frankfurter's "The Public and Its Government" (Yale University Press, 1930) pp. 81, 83 21

Page

Moody's Manual of Public Utilities, 1942 Ed. p. a3 and pp. a83, a91 21

Nelson's Perpetual Loose Leaf Encyclopaedia, Vol. X, p. 91A 23

Spurr's "Guiding Principles of Public Service Regulation" (Public Utilities Reports, Inc. 1924) pp. 27, 28 20

Standard and Poor's Trade and Security Index for 1941 21

SUPREME COURT OF THE UNITED STATES

October Term, 1943

No. 112

Davies Warehouse Company, a corporation,
Petitioner,

vs.

Prentiss M. Brown, Price Administrator,
Respondent.

Reply of Petitioner to Brief for the Respondent in Opposition

PRELIMINARY STATEMENT

Petitioner has no comment to make respecting that portion of respondent's brief preceding the argument (pp. 1-5), except to say that, in characterizing the question presented in this proceeding, respondent's over-emphasis of the fact that petitioner is a public utility under California law might create the impression that petitioner's plea for exclusion from the regulations imposed under the Emer-

gency Price Control Act of 1942 is based solely upon that fact. What petitioner actually contends is that it is a public utility within the meaning of Section 302(c)(2) of the Act, as amended, and, hence, is exempt from regulation thereunder not only because it is a public utility under California law but because it is a public utility *in fact* within the plain meaning of that section.

However, because petitioner is defined as a public utility under California law and is subject to maximum rate regulation by that State are not only important but conclusive factors as to whether or not it is exempt from regulation by respondent under the provisions of Section 302 (c)(2), as amended. Common carriers engaged in interstate or foreign commerce by rail, motor vehicle and water are exempt from regulation by respondent under Section 302(c)(2), as amended, for the same reason, i.e., because they are defined as common carriers and are subject to maximum rate regulation by the Interstate Commerce Commission under the provisions of the Interstate Commerce Act.[1] Similarly exempt, for the same reason, are (a) public utilities or common carriers engaged in the transmission and sale in interstate commerce of electric power and gas under the provisions of the Federal Power Act;[2] (b) public utilities or common carriers engaged in the transmission in interstate commerce of telephone and telegraph communications under the provisions of the

1. Act Feb. 4, 1887, C. 104, 24 Stat. 379; 49 U.S.C.A. §§1 et seq.; Act Aug. 9, 1935, C. 498, 49 Stat. 543; 49 U.S.C.A. §§301 et seq.; Act Sept. 18, 1940, C. 722, Title II §201, 54 Stat. 929; 49 U.S.C.A. §§901 et seq.

2. Act June 10, 1920, C. 285, §320, added Aug. 26, 1935, C. 687, Title II, §213, 49 Stat. 863, 16 U.S.C.A. §§791a et seq.

Communications Act of 1934[3] and (c) certain classes of public utilities in some of the states (notably Iowa[4]) which are defined, and are subject to maximum rate regulation, as public utilities, by the municipalities of those states rather than by direct state control.

Let it be supposed that at the time of the passage of the Act there was no maximum rate regulation of interstate common carriers, power, gas, telephone and telegraph companies by the Federal agencies above named. Is it possible that Congress would have left them out of the price control features of the Act merely because they might be considered "traditional utilities"? We think not. It was because of the existence of maximum rate regulation by these Federal agencies which prompted Congress to exempt them from control by respondent.

ARGUMENT

A. Reply to Respondent's Argument That the Exemption in Section 302(c)(2) Is Analogous to Exemptions Contained in Taxing Acts (Res. Br. 5-6).

There can neither be narrow nor broad construction of the phrase "common carriers or other public utilities" as used in the exemption clause under question. These are words which should be given their natural significance,

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3. Act June 19, 1934, C. 652, §§1 et seq., 48 Stat. 1064 et seq., as amended; 47 U.S.C.A. §§151 et seq.

4. The rates of water, gas, heat and electric utilities are regulated by municipalities in Iowa by virtue of the provisions of Section 6143 of Chapter 312 of the Code of Iowa (1939), p. 1025.

bearing in mind that the main purpose of the Act in which they are contained is to prevent inflationary price rises.[5]

We fail to see how the cases of *Bank of Commerce v. Tennessee*[6] and *United States v. Stewart*[7] support respondent's position that the Emergency Court of Appeals might have dismissed the complaint solely in reliance of the principle announced therein. That principle is that those who seek an exemption from a tax must rest it on more than a doubt or ambiguity and that the exemption must be clearly defined and founded upon plain language.

In the instant case the exemption extends to "rates charged by any common carrier or other public utility". Respondent has conceded that petitioner is a public utility under California law. Under these circumstances, there could be no doubt or ambiguity as to the status of petitioner which is clearly defined as a public utility within the plain language of the exemption clause.

B. Reply to Respondent's Contention That Section 302(c)(2) Was Properly Construed So As to Be of Uniform Meaning Throughout the United States (Res. Br. 6 et seq.).

In this portion of the brief, respondent is making the same argument as that advanced by Judge Maris to the effect that petitioner's theory limits the scope of the application of the exemption clause in question and violates the principle that a federal statute will, in the absence of language in the statute to indicate a contrary intent, be given a general and uniform interpretation throughout

5. *Ozawa v. United States*, 260 U.S. 178, 194.
6. 161 U.S. 134, 146.
7. 311 U.S. 60, 71.

the country. In support of this position, Judge Maris cited the cases of *Lyeth v. Hoey*[8] and *Jerome v. United States*[9] (R. 111).

Neither this principle (with which we concur) nor the authorities cited in footnote 5 on page 6 of respondent's brief in support thereof can operate to deprive petitioner of its right of exemption.

Respondent persists in the inference that the result of petitioner's contention would be to make the exemption clause dependent solely upon the application of state laws. Our contention, which we have repeatedly asserted, is that the application of the exemption clause was made dependent upon those (1) federal, (2) state and (3) municipal laws which regulate the rates of common carriers and other public utilities. The Amendment of October 2, 1942, specifically mentions the "Federal, State, or municipal authority" having jurisdiction to consider proposed increases in rates of common carriers and other public utilities. The statute, therefore, is explicit that its application is to be made dependent, in part, upon the application and interpretation of state laws.

It is respectfully submitted that even if the exemption clause is not specifically made dependent, in part, upon the application of state laws, petitioner's contention calls for a general and uniform application of the exemption clause because (a) in any state where the warehouse business is regulated as a public utility, Congress exempted the rates and charges of that business from further regu-

8. 305 U.S. 188.
9. 318 U.S. 101.

lation; and (b) in every state where the warehouse business is unregulated, Congress intended that the Office of Price Administration would exercise direct price control by prescribing ceiling rates to carry out the purposes of the Act.

The same uniform result would be achieved with respect to any other class of common carrier or public utility which might be regulated in some states but not in others.

Are we to understand that, solely for the sake of peculiar ideas as to "standards", respondent assumes the position that he should not regulate utilities which in one or more states are not brought within federal or state regulation simply because he cannot, under the exemption, regulate the same class of utility in another state where there is such federal or state regulation? Are we to further understand that respondent's regulation over California public utility warehousemen is more important to the control of inflation than to allow much more comprehensive public utilities of other classes to entirely escape price control because of a strange and arbitrary dependence upon a uniform pattern?

Respondent testified before the House Banking Committee, as follows:

> "Now, as to the utilities. There is, as the members are aware, an adequate set of regulations as to the charges which utility companies can make. These, again, are based upon a long series of judicial determinations, *of state regulations, and of state laws*. It seemed to those drafting the bill that this was an area which was not likely to give difficulty of to cause, so far as they could see at that time, any inflationary

trend. The bill is designed to control an emergency inflationary situation and has left them out, just as it has transportation rates."[10] (Italics ours.)

While respondent may have had only state laws and state regulations in mind, Congress, nevertheless, decided not to limit the application of the exemption to existing state laws and regulations but extended it, as well, to existing Federal and municipal laws and regulations.

Since all "public utilities", as such, are not necessarily under federal maximum price regulation, it is perfectly natural to look to state laws for a determination of the meaning thereof. If a federal law said that public warehousemen are not public utilities, one need not go beyond that authority in interpreting the federal status, but where there is no federal definition the definition by the states is of great significance.

What is an intrastate "common carrier" or an intrastate "public utility"? Obviously, those which have been defined to be such by state statute and state regulatory laws, and these must be looked to for the purpose of determining what are "common carriers or other public utilities" within the meaning of the exemption clause.

The failure of Congress to specifically define any dividing line between the carriers and utilities which were to be exempt and those which were not could not, by the omission, prevent the interpretation of a federal law by making reference to a specific state standard where there is no federal standard in conflict therewith.

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10. House Hearings, pp. 54-55; see petitioner's opening brief, Appendix "A", p. i.

C. Reply to Respondent's Argument That It Was Not Intended to Make the Scope of the Administrator's Authority Dependent Upon the Non-Existence of State Rate Control (Res. Br. 7-8).

It so happens that Congress exempted "common carriers and other public utilities" from the Act, and had Congress any reservations in mind, it would have placed a limitation on the meaning of those words. There can be no controversy, we submit, over the meaning of words which in and of themselves are without controversy.

The object of the Emergency Price Control Act is to prevent unnecessary price rises. Congress has exempted "common carfiers or other public utilities" because their rates and charges are already under adequate regulation by existing federal, state and municipal authorities. There is no need for any additional regulation by the federal government through respondent nor for him to be confronted with an expensive staff of public utility experts who, at best, could do no better than to duplicate the pre-existing regulation set up by the federal government, the several states and certain municipalities.

This is the only sound and logical construction that can be drawn from the exemption contained in Section 302(c)(2) of the Act. The Amendment of October 2, 1942,[11] affirms this construction.

Are common carriers and other public utilities which are not subject to the jurisdiction of existing federal, state or municipal authorities to be considered as having freedom to increase their rates and charges without regulatory restraint? Inconceivably, the result of respondent's theory

11. Act Oct. 2, 1942, C. 578, §1, 56 Stat. 765; 50 U.S.C.A. App. §961.

would mean that as to what he terms the traditional utilities (common carriers, electric light and power, gas, heat, water, communications), there would be no price regulation whatever in those states and localities where federal, state or municipal regulation does not exist.

The classes of common carriers or other public utilities which would thus be able to increase their rates and charges at will, subject only to the giving of the thirty days' notice, as provided in the Amendment, would consist of (a) all common carriers by motor vehicle in the transportation of property in interstate commerce in a commercial zone;[12] (b) all common carriers and public utilities in Delaware; (c) common carriers by motor truck in three states; (d) common carriers by water in twenty-two states; (e) express common carriers in one state; (f) pipe line common carriers in twenty-three states; (g) electric utilities in six states; (h) gas utilities in seven states; (i) heat utilities in nineteen states and in the District of Columbia; (j) telephone utilities in one state; (k) telegraph utilities in three states; and (l) water utilities in seven states.[13]

D. Reply to Respondent's Discussion Regarding Legislative History of the Exemption Clause (Res. Br. 8 et seq.).

Our review of the discussions had before the Senate and the House and before their respective committes[14] demonstrates that the exemption was intended to extend to the rates of all "common carriers or other public utilities"

12. See petitioner's opening brief, pp. 28 et seq.
13. See Appendix "B" to petitioner's opening brief.
14. See Appendix "A" to petitioner's opening brief.

which are under adequate regulation by existing regulatory agencies, and there is not even a hint that public utility warehousemen were to be excluded any more than there is a hint that heat utilities were to be included.

May we ask what is a traditional public utility as regulated by a municipal authority and where in the law is the definition which Congress intended with respect to the exemption of common carriers and public utilities which are under the jurisdiction of municipalities? Obviously, Congress intended the answer to rest upon the existence or non-existence of an adequate municipal control of maximum prices of public utilities.

E. Reply to Respondent's Argument That the Legislative Repetition of the Phrase "Common Carrier or Other Public Utility" Is Persuasive Indication of Congressional Approval of the Existing Administrative Construction (Res. Br. 9-10).

While it is true that the Senate was expressly told that the Administrator had construed the exemption clause as exempting from his authority a telephone company which was not subject to state regulation, nevertheless that body, as well as the House of Representatives, has specifically declared, in the amendment, that the common carriers and utilities which are exempt from the Administrator's regulation are those which are subject to the jurisdiction of a federal, state or municipal authority.

During the pendency of the bill which was finally enacted as the Inflation Control Act of 1942, the Norris Amendment was introduced in the Senate which would have abolished the exemption contained in Section 302(c)(2). The bill went to conference where the Norris Amend-

ment was rejected and there was substituted in lieu thereof the proviso of Section 1 of the Inflation Control Act.[15] Thus an express limitation was placed upon the exemption so that, by reason of the amendment, Section 302(c)(2) was modified to read as follows:

> "Nothing in this Act shall be construed to authorize the regulation of * * * rates charged by any common carrier or other public utility" * * * "Provided, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase."

Since the exemption clause and the amendatory clause relate to the same classes of common carriers or public utilities, it must follow from the language of the amendatory clause that those common carriers or public utilities which Congress intended to be outside of regulation by the Price Administrator are those, *and only those*, which are subject to the jurisdiction of a federal, state or municipal authority.

In view of the foregoing, it is respectfully submitted that, by the Amendment of October 2, 1942, Congress specifically disapproved the Administrator's construction of the exemption clause that he had no power to regulate the rates of a telephone company or other classes of utilities in localities where they are not under regulation.

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15. 88 Cong. Rec. October 2, 1942, pp. 7970, 7971; see pages xx et seq. of Appendix "A" to petitioner's opening brief.

F. Reply to Respondent's Contention That the Interpretation of the Exemption Provision by the Court Below Avoids Several Consequences Inimical to Effective Price Control (Res. Br. 9 et seq.).

Respondent urges that "Without coherent federal regulation of the charges for such services (common carrier and public utility services) the establishment and maintenance of maximum prices for those commodities would be rendered immeasurably more difficult."

We do not believe this to be true. The prescribing of maximum rates and charges by the Railroad Commission of the State of California (or any other rate regulatory body), together with the Administrator's right to intervene on behalf of the public, fully and completely serves the price stability intended by the Act. Should the Price Administrator have reason at any time to believe that the rates or charges of any California warehouseman (or of any warehouseman in any state which regulates their rates and charges) have become or threaten to become inflated, he could petition the Commission to issue its order compelling a reduction in such rates and charges to the extent that they may be shown to be inflated.

Respondent goes on to say that:

> "As the court below recognized, the alternative interpretation would have created serious administrative difficulties. The determination of the existence of valid state public utility regulation would be difficult at best, and at worst, impossible. The economic basis for the state's action would have to be appraised against a background of state and federal constitutional law. Even should the Administrator determine the exercise of legislative authority to be constitutionally well founded, the substantive nature of the

> regulation, the precise coverage of the state statutes, and their actual administration would still require investigation. To have required the Administrator to make such determinations would be to require him to embark upon investigations not only irrelevant to, but inconsistent with, the important tasks assigned to him by Congress."

This excuse of an inability to perform a duty plainly indicated by the Act is as weak as it is unfounded. The determination of the existence of valid state public utility regulatory provisions is as simple as a cursory examination of the statutes of the states affected. There is nothing hidden about these state laws.

Finding by simple search the existence of a valid law empowering regulation by a state of the rates of a common carrier or other public utility, respondent would only have to communicate with the regulatory agency of that state with respect to its administrative standards, and the economic factors involved, reserving the right (a) to require a public hearing and (b) to intervene in any particular public utility warehouse rate proceeding if, for any reason, it would appear to be that important.

The time which respondent would thus conserve could be devoted by him to the regulation of the prices of unregulated industries, including, of course, unregulated common carriers and other public utilities.

If a common carrier or other public utility is not under regulation by an existing federal, state or municipal authority it would appear to be the duty of respondent to ascertain that fact as well as the economic factors

involving such common carrier or public utility, to the end that its rates should not be permitted to become inflated.

G. Reply to Respondent's Argument That the Public Warehousing Business Is Covered by the Act Because, Under Section 302(c) Thereof the Term Commodity Includes Services Rendered in Connection With the Storage of a Commodity (Res. Br. 11-12).

If it be true that the definition of a commodity includes services in connection with the "storage" (by a public utility warehouseman) and "distribution" of a commodity, railroads and other common carriers would also be included within the price control features of the Act, since they engage in the business of the "distribution" of commodities. Congress could not have intended, under Section 302(c), to exempt common carriers without exempting public utility warehousemen. While it is true that rates of certain storage facilities are subject to the control of respondent, nevertheless when a storage enterprise is conducted as a public utility, it falls within the provided exemption, which is dominant and controlling.[16]

Most assuredly do we question the statement of respondent on page 11 of his brief that

> "The administrative determination that the bulk of storage services are furnished by public warehouses is unquestioned."

Unless actually in transit, storage is necessary by one means or another of all raw materials and all processed

16. This conclusion was reached by Chief Judge Vinson in his dissenting opinion (R. 143). See pages 26 to 31 of petitioner's opening brief for a more detailed discussion of this subject.

or manufactured goods until they have finally reached the consumer or the shelves of the retailer in the shape required for use.

To say that the bulk of storage services are furnished by public warehouses is to spread very thin the commodity wealth of our nation in either raw materials awaiting manufacture or of semi-processed or fully manufactured products awaiting sale to jobbers, wholesalers or dealers whose numbers are in the hundreds of thousands.

Even without reference to the stockpiles of raw materials stored on the premises of manufacturers, it is conceivable that private storage in the premises leased or owned by manufacturers, wholesalers, jobbers and dealers for the storage of their own merchandise in manufactured form will not only exceed the capacity of public warehousing facilities but will exceed it by at least ten or more times.

It is for this reason that Congress included in the term "commodity" in Section 302(c) the services rendered in the "distribution" and "storage" thereof so that the charges for these services, when performed in a private capacity, would not escape control. It was no more intended to regulate public storage maximum prices where they were already under adequate government regulation than it was intended to regulate "distribution" by common carriers which is a designation that would embrace all common carrier services.

H. Reply to Respondent's Contention That a Good Indication of the Common Understanding of the Term "Public Utility" May Be Found in the Use Made of It Generally by the State Legislatures (Res. Br. 12-13).

Here we find respondent resorting to the laws enacted by state legislatures in his frantic effort to find grounds to declare that regulated public utility warehousemen are not public utilities within the meaning of Section 302(c)(2) of the Act. And at the same time he wishes to ignore the circumstance that, where a state legislature has long provided for state regulation of a business as that of a public utility, it was that type of utility which Congress had in mind in enacting the exemption.

In Appendix "B" to our opening brief, it is shown that there are only twenty-six states which do not include any type of warehouse in the statutory definition for purposes of rate regulation; that California, Indiana, Minnesota and North Dakota regulate the rates of warehousemen without limitation; that Arkansas regulates the rates of farm products warehouses only; that Georgia regulates warehouse rates when warehouses are maintained by a railroad; that Illinois, Kansas, Missouri, Nebraska and South Dakota regulate the rates of grain warehouses only; that Iowa regulates the minimum rates on agricultural products stored in bonded warehouses only, with the power in the Iowa State Commerce Commission to change the minimum rates; that North Carolina regulates the maximum charges of tobacco warehouses only; that Oklahoma regulates the rates of grain, cotton and broom corn warehouses only; that Oregon regulates the rates of grain and hay warehouses only; that Nevada and Texas regulate

the rates of warehouses when used in connection with railroads; that Washington regulates warehouses in counties of 30,000 population or more; and that Idaho, Maine, Utah and Wisconsin regulate the rates of warehouses when used in connection with common carriers.

There is nothing misleading about the chart attached to petitioner's opening brief as Appendix "B" as respondent charges in footnote 17 on page 13 of his brief. The statutory references (Appendix "C" of petitioner's opening brief) support every conclusion shown on the chart. We confidently assert that 22 states regulate warehouses as public utilities under the doctrine of *Munn v. Illinois*[17] and not as milk vendors under *Nebbia v. New York*.[18] Petitioner not only infers, but states as a fact, that these twenty-two states regulate warehousemen as public utilities. Significantly, seventeen of these twenty-two regulate the rates of these public utility warehousemen by and through railroad, public utility or public service commissions, namely: Arkansas, California, Georgia, Idaho, Illinois, Indiana, Iowa, Maine, Minnesota, Nebraska, Nevada, North Dakota, South Dakota, Texas, Utah, Washington and Wisconsin.

However, it is really unimportant whether or not, three, eight, seventeen or twenty-two states regulate the rates and charges of public utility warehousemen. Respondent concedes that some states exercise maximum rate regulation over public utility warehousemen as defined in those states. To the extent of that regulation, the exemption

17. 94 U.S. 113.
18. 291 U.S. 502.

contained in Section 302(c)(2) applies. *All* other warehouse rates and charges are subject to the control of respondent. This rule of construction applies to all other classes of common carriers and public utilities.

Nebbia v. New York, supra, discussed on page 13 of respondent's brief, involved the power of the State of New York to prescribe by statute maximum prices for the sale of milk. The statute was upheld as a proper exercise of the police power because the regulation of maximum milk prices was necessary as a health measure and in the interest of the welfare of the people of that State. The regulation of the warehouse industry in the twenty-two states shown on our chart could not be justified as a health measure or upon any ground other than that they are operating as public utilities.

Munn v. Illinois, supra, mentioned on page 14 of respondent's brief, arose upon an information filed in the Criminal Court of Cook County, Illinois, against the plaintiffs in error (Munn and Scott) for transacting business as public warehousemen without a license. The defendants admitted the facts charged, but alleged that the statute, requiring the license, was unconstitutional for attempting to fix the maximum rates of storage. In holding that this regulation by the State of Illinois constituted a proper exercise of the police power which did not contravene the Fourteenth Amendment, this Court said, in part (p. 131 of 94 U.S.):

> "Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney-coachman, pur-

> sues a public employment and exercises 'a sort of public office,' these plaintiffs in error do not. They stand, to use again the language of their counsel, in the very 'gateway of commerce', and take toll from all who pass. Their business most certainly 'tends to a common charge, and is become a thing of public interest and use.'"

The case held that the State of Illinois could properly fix maximum storage rates for public warehouses on the ground that they were engaged in a business as to which the public interest demanded regulation. The decision in the *Nebbia* case does not affect that holding but merely sustains the exercise of the police power by the State of New York in fixing maximum milk prices upon a different ground.

The *Nebbia* case cannot be considered as having in any way affected the holding of the *Munn* case that a public warehouseman, for the purposes of maximum rate regulation, is engaged in a business which the public interest demands shall be regulated. The *Nebbia* case discussed the *Munn* case only for the purpose of rejecting the claim made by the appellant that the court in the *Munn* case "in there sustaining a statutory prescription of charges for storage by the proprietors of a grain elevator, limited permissible legislation of that type to businesses affected with a public interest, and he says no business is so affected except it have one or more of the characteristics he enumerates."[19] This Court then went on to explain why appellant's claim was based upon a misconception of the *Munn* case.

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19. 291 U.S. at page 532.

It doesn't make any difference whether the Court in the *Munn* case was attempting to define the term "public utility," in accordance with the layman's interpretation of the term. What the Court was dealing with was "a business which public interest demands shall be regulated" as was pointed out in the *Nebbia* case. The "business which public interest demands shall be regulated" was the warehouse business.

While it may not be important as to what the technical definition of the term "public utility" may be, the important point is that the warehouse business has been declared by the State of California and twenty-one other states to be a "business which public interest demands shall be regulated," and it has been regulated as such.

Any case involving the term "public utility" must reach for its fundamental premise to the *Munn* case, which is generally recognized as the public utility landmark in American law. Any case concerning whether or not a particular business is that of a public utility must inevitably be considered in the light of that case.[20]

I. Reply to Respondent's Argument That the Term "Public Utility" Is Limited in Its Scope to Common Carriers and to Such Utilities as Electric, Gas, Telephone, Telegraph, Water and Heat Utilities (Res. Br. 13-14).

Respondent discusses *Nebbia v. New York*,[21] *Pulitzer Publishing Company v. Federal Communications Commis-*

20. See Spurr's "Guiding Principles of Public Service Regulation" (Public Utilities Reports, Inc. 1924) pp. 27, 28, and Encyclopaedia Britannica, Vol. 18, p. 746. See also Chief Judge Vinson's discussion of the *Munn* case in his dissenting opinion (R. 132).

21. 291 U.S. 502, 534.

sion,[22] Mr. Justice Frankfurter's book entitled "*The Public and Its Government*",[23] *Moody's Manual of Public Utilities*[24] and *Standard and Poor's Trade and Security Index for 1941*, in an attempt to show that the definition of a public utility is limited to common carriers and to such utilities as electric, gas, telephone, telegraph, water and heat utilities (Res. Br. 14). A careful reading of these authorities and manuals does not warrant the conclusion that there was any intention to restrict the term "public utility" to the examples set forth therein.

For example, while it is true that in "The Public and Its Government", the statement is made (p. 81) that: "To think of contemporary America without the intricate and pervasive systems which furnish light, heat, power, water, transportation, and communication, is to conjure up another world", yet, we find on page 83 (in discussing the historical development of regulation) the following statement:

> "So, legislatures began to experiment with early forms of continuous administrative oversight of railroads and, in the wheat regions, of *grain elevators*". (Italics ours.)

In *Budd v. State of New York*,[25] this Court held that grain elevators and warehouses are charged with the public interest and occupy a position in the community "analogous to that of common carriers" so as to make them proper subjects for state regulation.

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22. 94 Fed.(2d) 249 (App. D.C.) 251.
23. Yale University Press (1930) p. 81.
24. 1942 Ed. p. a3 and pp. a83, a91.
25. 143 U.S. 517.

Why does respondent fail to mention the business of ginning cotton which has been specifically declared to be that of a public utility by this Court?[26]

We need only turn to the well known encyclopaedias which, we submit, would be the first place any person would look for a definition of the terms "common carrier" and "public utility".

The Encyclopaedia Britannica contains this statement in the article entitled "Public Utilities":[27]

> "The following have been treated as and classified into groups of public utilities: (1) services of transportation (common carriers); (2) services incidental to transportation; (3) services facilitating communication; (4) facilities providing power, light, heat and refrigeration; (5) facilities providing water and sanitation in urban communities; (6) facilities regulating water supply for agricultural purposes."

The services which are rendered by a public utility warehouseman fall within the second classification above, inasmuch as they are "services incidental to transportation". Commercial storage is inseparable from transportation because, without a place of storage, there could be no inventory to demand the use of transportation.

The bulk of property which is stored by commercial warehousemen is brought to or taken from their warehouses by a common carrier. Any commercial warehouseman worthy of the name has rail spur track facilities on which rail freight cars are spotted and their contents

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26. *Frost v. Corporation Commission of Oklahoma*, 278 U.S. 515.

27. Vol. 18, p. 745.

are loaded into or taken from the warehouse facility. As so well expressed by this Court in the *Munn* case, "they stand * * * in the very 'gateway of commerce', and take toll from all who pass".[28]

The facility would also have a truck platform for loading and unloading. It may be generally stated, without challenge, that property going to or from storage in a commercial warehouse is brought to or taken from it by a common carrier by rail and truck and also by vessel in those instances where the warehouse is so located as to be able to take shipside deliveries. These common carriers, particularly the railroads, could not properly function without the availability of these warehouses to act as a link in the chain of transportation.

Property brought into the warehouse remains in storage until the time arrives for its ultimate delivery. Except in those instances when the consignee of the property takes delivery out of the warehouse by means of his own or contract carrier transportation facilities, the delivery services are performed either by local common carrier draymen operating within the local area of distribution or by rail or truck common carriers for re-transportation into extended areas of distribution.

The definition of the term "public utility" in *Encyclopaedia Americana*[29] and *Nelson's Perpetual Loose Leaf Encyclopaedia*[30] includes warehouses.

The commercial warehouseman and common carrier could not function without each other. It is for this

28. 94 U.S. 113, 131.
29. Vol. 22, pp. 778-779.
30. Vol. X, p. 91A.

reason that in some states (California, Idaho, Maine, Texas, Utah and Wisconsin), the statutory definition of a public utility warehouseman is one who operates a warehouse "in connection with or to facilitate the transportation of property by a common carrier".[31]

It is important to note that the Uniform Warehouse Receipts Act has been adopted by forty-six states, thus giving the use of warehouse receipts significance equal to that of a common carrier's bill of lading.[32]

The United States Warehouse Act,[33] to which respondent refers on page 15 of the brief, is an act permitting certain agricultural warehouses to obtain a license in order to issue bonded warehouse receipts so as to extend their negotiability in far removed money markets by reason of a government license and the protection of a good and sufficient bond. This, we submit, is not a statute to regulate maximum rates and it obviously has no pertinency to the issue raised in this proceeding.

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31. *California*—Section 2(aa) of the California Public Utilities Act, California Statutes 1915, p. 118; Deering's General Laws of California (1937) Volume Two, p. 3124. *Idaho*—Section 59-128 of the Idaho Code Annotated (1932), Vol. 3, p. 832. *Maine*—Section 15 of Chapter 62 of Maine Revised Statutes (1930), p. 1029. *Texas*—Article 6445 of Vernon's Texas Statutes (1936), p. 1183. *Wisconsin*—Section 195.02 of Wisconsin Statutes (1937), p. 2002.

32. References to the statutes whereby the forty-six states have adopted the Uniform Warehouse Receipts Act will be found in Appendix "A" hereto attached.

33. C. 313, 39 Stat. 486, et seq., 7 U.S.C. §§241-273.

J. Reply to Respondent's Contention That the Administrator's Interpretation of the Act Is Entitled to Great Weight (Res. Br. 16).

Finally, respondent states (Res. Br. 16):

> "It is clear that the Administrator's interpretation of the Act is entitled to great weight. Approval of such an interpretation by the special court created to review the validity of the Administrator's regulations and orders should normally be sufficient to settle the controverted question."

In making the statement that the Administrator's interpretation of the Act is entitled to great weight, respondent cites no authority, but undoubtedly relies upon the principle announced in *United States v. American Trucking Associations, Inc.*,[34] where this Court said:

> "The Commission (Interstate Commerce Commission) and the Wage and Hour Division, as we have said, have both interpreted Section 204(a) as relating solely to safety of operation. In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations involve 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new'."

The quoted language, which is taken verbatim from *Norwegian Nitrogen Products Co. v. United States*,[35] indicates to us that what this Court had in mind was

34. 310 U.S. 534, 549.

35. 288 U.S. 294, 315.

contemporaneous construction of a statute by such administrative agency as to the administrative provisions of a statute. Surely the doctrine was not intended to extend to a situation where, as here, such contemporaneous construction would do violence to the plain language employed in the statute.

A distinction should be drawn, we feel, as between the interpretation by such agency of a statute in connection with its administration; on the one hand, and its interpretation with respect to whether or not such agency has jurisdiction over a person involved in the statute, on the other. The latter involves a question of law which should be reserved exclusively for determination by the courts.

To adopt respondent's construction of Section 302(c)(2) in the instant case would rob the words "common carrier or other public utility" of their natural significance as applied to the purposes of the Act.

The interpretation of the exemption clause whereby public utility warehousemen are excluded from the provisions thereof was made by Leon Henderson at the time that he was Price Administrator. His successor (the present respondent), while a member of the United States Senate, was manager of the bill which was later enacted as the Inflation Control Act of 1942.[36] As heretofore discussed, this particular bill was sent to conference where, among other things, the Norris Amendment, which would have abolished the exemption created by Section 302(c)(2), was rejected and, in lieu thereof, the proviso of Section 1 of the Inflation Act was adopted. In discussing this substi-

36. Act Oct. 2, 1942, C. 578, 56 Stat. 765; 50 U.S.C.A. App. §§961 et seq.

tute, Senator Brown had this to say on the floor of the Senate:

> "Mr. Brown. Mr. President, section 1 of the conference report follows section 1 of the Senate bill; in fact, I can say very generally the conferees adopted the Senate bill with some slight modifications. The principal change in section 1 is that the Norris amendment which gave the President an all-over control of public-utility and common-carrier rates is stricken from the bill. *There is substituted for it a provision which will require any public utility which asks for an increase in rates to notify the President and to assent to the appearance of such agent as the President may designate to appear in behalf of the consuming public before the appropriate railroad or public utility commission, be it a State, Federal, or municipal commission.*" (Italics ours.)[37]

In view of Mr. Brown's statement, it is hard to believe that, as Price Administrator, he would construe the exemption clause as excluding public utility warehousemen who are under adequate regulation by a state commission. Chief Judge Vinson is now Economic Stabilization Director and, in this latter capacity, has control of the administration and enforcement of the Emergency Price Control Act of 1942, as amended. In view of his vigorous dissent in the instant case, it is hardly conceivable that he would interpret Section 302(c)(2), as amended, as excluding public utility warehousemen from the operation of the exemption clause.

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37. 88 Cong. Rec. October 2, 1942, p. 7970; see petitioner's opening brief, Appendix "A", pp. xx-xxi.

We direct attention to this anomalous situation for the purpose of showing that the "great weight" rule should have no application in a situation where a governmental agency has construed a statute upon a question of jurisdiction over a person involved in the statute.

K. Reply to Respondent's Contention that the Affirmance of His Interpretation by the Emergency Court of Appeals Is Sufficient to Settle the Controverted Question (Res. Br. 16).

All that petitioner has a right to ask is its day in court. We cannot take respondent seriously if he contends that petitioner has had its "day in court" because the majority opinion of the Emergency Court of Appeals has upheld the interpretation of the Administrator in the face of, *first*, a vigorous dissenting opinion by Chief Judge Vinson, *second*, the fact that the concurring opinion of Judge Magruder was prefaced with the remark that "With some hesitation, I concur in the result reached by Judge Maris. This is one of those unfortunate cases where doubts would remain whichever way the case was decided," (R. 118) and, *third*, the fact that Judge Maris concurred in the views expressed by Judge Magruder. (R. 119)

CONCLUSION

It was not, and is not, the purpose of petitioner to escape regulation. Petitioner realizes that inflationary tendencies must be checked in the proper prosecution of the present war.

The point that we wish to bring home is that petitioner is already under the adequate and complete control, as to its rates and charges, of the Railroad Commission of the State of California. It does not, and cannot, object to that regulation. It has been living under it for a number of years. What petitioner does object to is being singled out for double regulation where none is necessary and where none was intended.

It is enough that petitioner is required to comply with the laws of the State of California pertaining to the maximum rates which it shall charge for the services which it renders as a public utility. Under the provisions of those laws, petitioner must make an adequate showing before the Railroad Commission of California that any increase in rates proposed by it is justified. The process which a public utility in California is required to undergo in order to make that showing is extremely burdensome and expensive.

It is asking too much, when Congress did not intend it, that petitioner and other public utility warehousemen, after securing from the California Railroad Commission an order authorizing them to increase their rates, should then be required, with attendant delay and further expense, to obtain similar authorization from the Price Administrator.

Petitioner must obey the provisions of the Public Utilities Act of California *because it is a public utility.* It has been told by respondent that it must obey the provisions of the Emergency Price Control Act of 1942 *because it is not a public utility.* It is hoped that this Court will relieve petitioner from the intolerable position in which it has been placed as the result of an arbitrary interpretation of the Act by respondent in direct conflict with the intent of Congress.

Respectfully submitted,

REGINALD L. VAUGHAN,
Counsel for Petitioner.

Dated at San Francisco, California
September 23, 1943.

(APPENDIX FOLLOWS)

Appendix "A"

Statement Showing States Which Have Adopted the Uniform Warehouse Receipts Act and the Statutory References in Support Thereof.

State	Statutory Reference	State	Statutory Reference
Alabama	Laws 1915, p. 661	Montana	Laws 1917, ch. 154
Arizona	Laws 1921, ch. 47	Nebraska	Laws 1909, ch. 152
Arkansas	Laws 1915, act 273	Nevada	Laws 1913, ch. 269
California	Laws 1909, ch. 290	New Jersey	Laws 1907, ch. 133
Colorado	Laws 1916, ch. 226	New Mexico	Laws 1909, ch. 38
Connecticut	Laws 1907, ch. 220	New York	Laws 1907, ch. 732
Delaware	Laws 1917, ch. 221	North Carolina	Laws 1917, ch. 37
Florida	Laws 1917, ch. 7403	North Dakota	Laws 1917, ch. 250
Georgia	Laws 1937, pp. 390-413	Ohio	Laws 1908, p. 400
Idaho	Laws 1915, ch. 31	Oklahoma	Laws 1915, ch. 288
Illinois	Laws 1907, p. 477	Oregon	Laws 1913, ch. 305
Indiana	Laws 1921, ch. 100	Pennsylvania	Laws 1909, No. 13
Iowa	Laws 1907, ch. 160	Rhode Island	Laws 1908, ch. 1549
Kansas	Laws 1909, ch. 262	South Dakota	Laws 1913, ch. 364
Kentucky	Laws 1938, ch. 146	Tennessee	Laws 1909, ch. 336
Louisiana	Laws 1908, act 221	Texas	Laws 1919, ch. 126
Maine	Laws 1917, ch. 143	Utah	Laws 1911, ch. 139
Maryland	Laws 1910, ch. 406	Vermont	Laws 1912, No. 186
Massachusetts	Laws 1907, ch. 582	Virginia	Laws 1908, ch. 290
Michigan	Laws 1909, No. 303	Washington	Laws 1913, ch. 99
Minnesota	Laws 1913, ch. 161	West Virginia	Laws 1917, ch. 8
Mississippi	Laws 1920, ch. 218	Wisconsin	Laws 1909, ch. 291
Missouri	Laws 1911, p. 431	Wyoming	Laws 1917, ch. 96

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute and regulation involved	2
Statement	2
Argument	5
Conclusion	17
Appendix:	
A. Emergency Price Control Act of 1942, 56 Stat. 23, section 302 (e)	18
B. Analysis of State Statutory Definitions of "Public Utility"	19
C. Statutory References Underlying Appendix B	20

CITATIONS

Cases:	
Bank of Commerce v. *Tennessee*, 161 U. S. 134	6
Calhoun Gold Mining Co. v. *Ajax Gold Mining Co.*, 182 U. S. 499	6
Chicago Board of Trade v. *Johnson*, 264 U. S. 1	6
DeGanay v. *Lederer*, 250 U. S 376	10
D'Oench, Duhme & Co. v. *Federal Deposit Insurance Corporation*, 315 U. S. 447	6
Eagan v. *Commissioner of Internal Revenue*, 43 F. (2d) 881	12
Jerome v. *United States*, 318 U. S. 101	6
Keifer & Keifer v. *Reconstruction Finance Corporation*, 306 U. S. 381	7
Lincoln Savings Bank of Brooklyn v. *Brown*, decided May 7, 1943	12
Lyeth v. *Hoey*, 305 U. S. 188	6
Morgan v. *Commissioner of Internal Revenue*; 309 U. S. 78	6
Nebbia v. *New York*, 291 U. S. 502	13
Pulitzer Publishing Company v. *Federal Communications Commission*, 94 F. (2d) 249	14
Scripps-Howard Radio, Inc., v. *Federal Communications Commission*, 316 U. S. 4	7
United States v. *Stewart*, 311 U. S. 60	6
Wolff Packing Co. v. *Court of Industrial Relations of Kansas*, 262 U. S. 522	13

Statutes: Page

Emergency Price Control Act of 1942, 56 Stat. 23, Section 302 (c) 11, 18

Emergency Price Control Act, as amended, 56 Stat. 765, section 1 (50 U. S. C. App. § 961) 9

United States Warehouse Act, 39 Stat. 486 (7 U. S. C. §§ 241–273) 15

Constitution of California, Article IV, section 33, Article XII, section 23 2

Public Utilities Act of California, sections 2 (aa), 2 (dd), 2½, 14, 15, 63 (a) 2

Colorado Stat. Ann. (1935), ch. 137, section 3 7

Miscellaneous:

87 Cong. Rec. 9308 8

88 Cong. Rec. 68 12

88 Cong. Rec. 7343–7346 ..... 9, 12

Frankfurter, *The Public and its Government* (1930) 81 ..... 14, 15

General Maximum Price Regulation, 7 Fed. Reg. 3153 3

Hearings before House Committee on Banking and Currency on H. R. 5479, superseded by H. R. 5990, 77th Cong., 1st sess 8

Hearings before Senate Committee on Banking and Currency on H. R. 5990, 77th Cong., 1st Sess 12

Moody's *Manual of Public Utilities* (1942 ed.) 14

Reports on Business, Census of Business: 1939, Vol. 3, Service Businesses (U. S. Dept. of Commerce, 16th Census, 1940) 244 12

Sen. Rep. No. 931, 77th Cong., 2d Sess 8, 12

Standard and Poor's *Trade and Security Index for 1941* 14

Supplementary Regulation No. 11, 7 F. R. 4738 3

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 112

DAVIES WAREHOUSE COMPANY, PETITIONER

v.

PRENTISS M. BROWN, PRICE ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 109–144) is not yet reported.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered May 28, 1943 (R. 145). The petition for a writ of certiorari was filed June 21, 1943. Jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, 56 Stat. 23.

QUESTION PRESENTED

Whether petitioner, a public warehouse company in California, is a "public utility" within the meaning of Section 302 (c) (2) of the Act, and hence exempt from regulation under the Act, because it is designated and regulated as a "public utility" by California law.

STATUTE AND REGULATION INVOLVED

The pertinent provision of the Emergency Price Control Act appears in Appendix A, *infra*, p. 18. The pertinent provisions of the General Maximum Price Regulation appear in the Record at pp. 48–50 and 59.

STATEMENT

Petitioner conducts the business of a public warehouse in the city of Los Angeles, California. Its business is declared by both constitution [1] and statute [2] of California to be that of a public utility subject to regulation by the Railroad Commission of California. That regulation includes the fixing of rates and charges of petitioner. Pursuant to the California statute the Railroad Commission on May 12, 1942, authorized petitioner to increase its rates, effective May 22, 1942. (R. 109.)

On April 28, 1942, the Administrator, acting under the authority conferred upon him by the Act,

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[1] Constitution of California, Article IV, section 33; Article XII, section 23 (R. 17–19, 109).

[2] Public Utilities Act of California, sections 2 (aa), 2 (dd), 2½, 14, 15, 63 (a) (R. 16–17, 109).

issued a General Maximum Price Regulation[3] (R. 46–75), which fixed as maximum prices of the commodities and services governed by that regulation the highest prices charged by each seller for the particular commodity or service during the month of March 1942. Section 10 of that regulation, as amended (R. 59), provided that it should not apply to such services as might be specified by supplementary regulation or amendment thereto. On June 16, 1942, the Administrator issued Supplementary Regulation No. 11[4] (R. 97), providing that the General Maximum Price Regulation should not apply to certain services until July 1, 1942. Among the services so specified were "Commercial storage and warehousing and services incident thereto."

Amendment No. 1 to Supplementary Regulation No. 11 (R. 101–105), issued June 23, 1942, provided for the exemption of certain services from the operation of the General Maximum Price Regulation, effective July 1, 1942. Of the services excepted by the amendment, the only ones partaking of the nature of a common carrier or other public utility were the following:

> (21) Electricity (companies furnishing, as public utilities), rates charged by
>
> * * * * * *
>
> (25) Express companies and freight forwarders offering their services to the gen-

[3] 7 F. R. 3153.
[4] 7 F. R. 4738.

eral public as common carriers, rates charged by

* * * * *

(30) Gas (companies supplying, as public utilities through mains), rates charged by

* * * * *

(38) Light, heat, or power (companies furnishing, as public utilities), rates charged by

* * * * *

(61) Telephone services, rates charged for

(62) Telegraph services, rates charged for

* * * * *

(68) Transportation of commodities by persons offering their services to the general public as common carriers by rail, water, motor, pipe line, or other means of conveyances, rates charged for; Provided, however, that charges for storage and warehousing and all other services incident thereto by any person shall not be excluded from the General Maximum Price Regulation.

* * * * *

(69) Transportation of persons, rates charged for

* * * * *

(73) Water (companies supplying, to urban areas as public utilities), rates charged by

* * * * *

The effect of the General Maximum Price Regulation and Supplementary Regulation No. 11, as amended, as applied to petitioner was to prohibit it after July 1, 1942, from charging the increased rates which had been approved by the California Railroad Commission. Petitioner filed a timely protest to the General Maximum Price Regulation asserting itself to be a public utility within the meaning of Section 302 (c) (2) of the Act. The Administrator denied that protest and petitioner filed a complaint in the Emergency Court of Appeals. That complaint was dismissed, the court holding that petitioner was not a public utility within the meaning of the exemption in Section 302 (c) (2) of the Act.

ARGUMENT

The Administrator interpreted the exemption of "rates charged by any * * * public utility" as applying to those businesses which have been traditionally regarded and are generally thought of as "public utilities." So construed, the exemption applies uniformly to the same kinds of businesses throughout the United States without regard to whether such businesses are designated as "public utilities" by the states in which they operate and without regard to whether a state or other federal agency controls their rates. We submit that the Emergency Court of Appeals properly approved that interpretation and properly dismissed the complaint. The decision did not rely, as it might have done, upon the principle that in

a statute of broad application exemptions are to be strictly construed; what has been said of exemptions in taxing acts is equally applicable here, that "a well-founded doubt is fatal to the claim." *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 146; see *United States* v. *Stewart*, 311 U. S. 60, 71. In any event, the decision is correct and does not call for review.

1. Section 302 (c) (2) was properly construed so as to be of uniform meaning throughout the United States. This Court has recently had occasion to restate the well established rule that descriptive terms in federal statutes, in the absence of plain indication to the contrary, should be given a general and uniform interpretation and should not be made dependent upon varying state laws in their application. *Jerome* v. *United States*, 318 U. S. 101, 104.[5] The genesis and purposes of the Emergency Price Control Act make it peculiarly appropriate that this general rule of construction

[5] There it was said, "But we must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law. That assumption is based on the fact that the application of federal legislation is nationwide * * * and at times on the fact that the federal program would be impaired if state law were to control." Accord: *Morgan* v. *Commissioner of Internal Revenue*, 309 U. S. 78; *Lyeth* v. *Hoey*, 305 U. S. 188; *Chicago Board of Trade* v. *Johnson*, 264 U. S. 1; *Calhoun Gold Mining Co.* v. *Ajax Gold Mining Co.*, 182 U. S. 499.

See also Jackson, J., concurring in *D'Oench, Duhme & Co.* v. *Federal Deposit Insurance Corp.*, 315 U. S. 447, 471–472.

should be followed in its interpretation. It is a statute "born of the exigencies of war,"[6] designed to meet a problem nationwide both in its causes and in its effects. It would be surprising indeed if Congress had conditioned the authority provided to cope with the problem of wartime inflation upon variations of local law.

The language of the Act contains no hint that Congress intended to make the scope of the Administrator's authority dependent upon the nonexistence of state rate control.[7] The clause of Section 302 (c) which exempts rates charged by public utilities is itself devoid of any such qualification. In view of the wide range of businesses which are already defined and regulated as "public utilities" by various state statutes,[8] and which might at any time be so defined and so regulated, such a qualification would have an effect obviously inconsistent with the broad, firm purposes of the Act. On the other hand, the Congressional intention that the Act should be so construed as to

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[6] *Scripps-Howard Radio, Inc.*, v. *Federal Communications Commission*, 316 U. S. 4, 17.

[7] Cf. *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306 U. S. 381, 395.

[8] See the illustrations of some of the businesses designated by state statutes as public utilities and regulated as such, collected in the opinion of the court below (R. 112). They range from "abbatoirs" to "wells." See particularly, Colorado Stat. Ann. (1935), Ch. 137, section 3, defining as a public utility "every corporation or person now or hereafter declared by law to be affected with a public interest."

achieve nationwide uniformity is emphasized by the establishment of the Emergency Court of Appeals and the delegation to it of exclusive jurisdiction, subject to review by this Court, to determine the validity of maximum price and rent regulations and orders. See Sen. Rep. No. 931, 77th Cong., 2d sess., p. 8.

Nor does the legislative history of the statute support the proposition that Congress intended the scope of the exemption for common carrier and other public utility rates to be determined by characteristics of local law or the existence of state regulation of particular businesses. Discussions at the committee hearings and in the legislative debates indicate, it is true, recognition of the fact that for the most part the businesses exempted by this provision would be subject to state regulation. But they also indicate recognition of the likelihood that some of these businesses would not be subject to local regulation, and, conversely, that some businesses outside the scope of the exemption would be subject to such regulation.[9] Furthermore, in Section 1 of the amendatory Act of October 2, 1942, after the Administrator's interpretation of the exemption had been publicly established for several months, the phrase "common

[9] Hearings before the House Committee on Banking and Currency on H. R. 5479, superseded by H. R. 5990, 77th Cong., 1st Sess. (1941), 54–55, 444–445, 626; 87 Cong. Rec., Nov. 24, 1941, at 9308. These references are set forth in full in Petitioner's Brief, Appendix A, pp. i to vi.

carrier or other public utility" was again used without qualification or definition.[10] During the debates on this measure the Senate was expressly told that the Administrator had construed Section 302 (c) (2) of the Act as exempting from his authority a telephone company which was not subject to state regulation.[11] Legislative repetition of the phrase under these circumstances is persuasive indication of Congressional approval of the existing administrative construction.

The interpretation of the exemption provision by the court below avoids several consequences inimical to effective price control. Particular businesses, either by virtue of historical accident or sectional economic considerations, may be locally designated and regulated as public utilities. These, in petitioner's view, would be exempt from regulation under the Act although their counterparts in a neighboring state or community might not be so exempt. Unjustified economic preferences, regional dislocations, and other evils would result. Many of the businesses which would be so affected supply services constituting important elements of cost in the distribution of commodities whose prices must be effectively regulated if the purposes of the statute are to be achieved. Without coherent federal regulation of the charges for

[10] 56 Stat. 765, 50 U. S. C. App. § 961.

[11] 88 Cong. Rec., September 10, 1942, 7343 to 7346, Petitioner's Brief, Appendix A, pp. vii to xx.

such services, the establishment and maintenance of maximum prices for those commodities would be rendered immeasurably more difficult.

As the court below recognized, the alternative interpretation would have created serious administrative difficulties. The determination of the existence of valid state public utility regulation would be difficult at best, and at worst, impossible. The economic basis for the state's action would have to be appraised against a background of state and federal constitutional law. Even should the Administrator determine the exercise of legislative authority to be constitutionally well founded, the substantive nature of the regulation, the precise coverage of the state statutes, and their actual administration would still require investigation. To have required the Administrator to make such determinations would be to require him to embark upon investigations not only irrelevant to, but inconsistent with, the important tasks assigned to him by Congress.

If, then, "public utility" is to be defined apart from state-created categories, the Administrator acted properly in taking the words in their "ordinary and usual sense, and with the meaning commonly attributable to them." *DeGanay v. Lederer*, 250 U. S. 376, 381. To have defined the phrase, as the dissenting opinion below does, in terms of technical criteria drawn from diverse

sources, including judicial opinions addressed to constitutional issues, would have imported into the administration of the Act in another form the reference to particular state laws and the consequent inequalities and complexities which Congress did not mean to impose. The Administrator and the court below took the phrase as descriptive of those enterprises which have commonly been denominated "public utilities."

2. The language of the statute and common acceptance support the conclusion of the Administrator and the court below that a public warehouse is not a "public utility" within the meaning of Section 302 (c) (2) of the Act. Section 302 (c) of the Act provides that the term "commodity" as used in the Act "includes services rendered * * * in connection with the processing, distribution, storage, installation, repair, or negotiation of purchases or sales of a commodity, or in connection with the operation of any service esfablishment for the servicing of a commodity: * * *" The administrative determination that the bulk of storage services are furnished by public warehouses is unquestioned (R. 44). It seems clear, therefore, that the public warehousing business is covered by the Act. Moreover, in the legislative consideration of the measure there were references to electric, gas, water, and telephone companies as exempt by virtue of the provisions of

section 302 (c) (2),[12] but warehouses were referred to only as subject to regulation.[13]

A good indication of the common understanding of such a term may be found in the use made of it generally by the state legislatures.[14] Forty-four jurisdictions include electric light and power companies in their definition of public utilities; forty-five jurisdictions include common carriers. A like number include telephone and telegraph companies; forty-two include water companies, while thirty-seven include gas companies in their statu-

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[12] 88 Cong. Rec. January 7, 1942, at 68; 88 Cong. Rec. September 10, 1942, at 7343, 7344.

[13] During the Senate Hearings the Administrator stated expressly that "warehousing" was one of the services subject to regulation. Hearings before the Committee on Banking and Currency, U. S. Senate, on H. R. 5990, 77th Cong., 1st Sess. (1941) 121–122. The meaning of the term "service establishment" is explained by the Report of the Senate Banking and Currency Committee as "intended to include all establishments rendering services in connection with the use of goods, including such typical establishments as laundries, cleaners and dyers, and other such establishments listed as service establishments by the United States Census." Sen. Rep. No. 931, 77th Cong., 2d Sess. (1942), 16. The United States Census includes "warehousing" in its list of service establishments. Reports on Business, Census of Business: 1939, Vol. 3, Service Businesses (U. S. Dept. of Commerce, 16th Census, 1940) 244. See also *Lincoln Savings Bank of Brooklyn* v. *Brown*, decided by the Emergency Court of Appeals, May 7, 1943, holding the renting of safe deposit facilities to be within the term "storage" as used in section 302 (c).

[14] Cf. *Eagan* v. *Commissioner of Internal Revenue*, 43 F. (2d) 881 (C. C. A. 5th).

tory definitions.[15] The treatment of warehouses by state legislatures is noteworthy by way of contrast.[16] Only three states include all warehouses in their statutory definition of public utilities; eight include sharply limited types of warehouses in their statutory definition. Thirty-six states and the District of Columbia make no mention of warehouses at all in their statutory definitions.[17]

The decisions of the federal courts express the same understanding of the meaning of the term. In *Nebbia* v. *New York*, 291 U. S. 502, the Court distinguished between public utilities and other businesses subject to state regulation, expressly listing those which fell within the former category.[18] After pointing out that the dairy industry

[15] See Chart set forth as Appendix B, *infra*.

[16] See Appendix B.

[17] The chart attached to Petitioner's brief as Appendix B is misleading. In the column headed "Warehouses" reference is made to 22 states which regulate the rates of certain warehouses. The inference is that such rate regulation constitutes a state classification of warehouses as "public utilities." The exercise of a state power to regulate the rates and charges of a particular business does not constitute such a business, in the accepted sense of the phrase, a public utility. *Nebbia* v. *New York*, 291 U. S. 502, 531. Furthermore, states are included in this column although only limited classes of warehouses are regulated.

[18] In *Wolff Packing Co.* v. *Court of Industrial Relations of Kansas*, 262 U. S. 522, 535, this Court also distinguished between public utilities and other businesses subject to state regulation.

was not "in the accepted sense of the phrase, a public utility," (p. 531), the Court went on to say (p. 534):

> In the same volume [as *Munn* v. *Illinois*] the Court sustained regulation of railroad rates. * * * Plainly the activities of railroads, their charges and practices, so nearly touch the vital economic interests of society that the police power may be invoked to regulate their charges, and no adtional formula of affection or clothing with a public interest is needed to justify the regulation. *And this is evidently true of all business units supplying transportation, light, heat, power and water to communities, irrespective of how they obtain their powers.* [Italics supplied.] [19]

Substantially the same view of the limited scope of the term "public utility" was expressed in *Pulitzer Publishing Company* v. *Federal Communications Commission*, 94 F. (2d) 249 (App. D. C.), where the court said (p. 251):

> But we have never said that a radio broadcasting station is a public utility in

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[19] See also Frankfurter, *The Public and its Government* (1930) 81. Similarly, the financial community usually excludes warehouses from its classifications of public utilities. Moody's *Manual of Public Utilities* (1942 ed.), p. a3 and pp. a83, a91. See also Standard and Poor's *Trade and Security Index* for 1941 listing only the following companies as public utilities: electricity, gas, telephone, telegraph, and electric railways.

> the sense in which a railroad is a public utility. Generally speaking, that term comprehends any facility employed in rendering quasi public service such as waterworks, gas works, railroads, telephones, telegraph, etc. * * *

Congress, by the United States Warehouse Act,[20] has regulated certain aspects of the activities of warehouses storing agricultural products. None of the indicia of public utility regulation are present. Indeed, the method chosen for rate regulation, the suspension of licenses when the rates are unreasonably high, is utterly inconsistent with any notion of "securing for society those essential services which are furnished by public utilities."[21]

In construing the exemption provision of Section 302 (e) (2) of the Act so as to achieve uniformity in its application throughout the country, the Emergency Court of Appeals followed the general rule for the construction of federal statutes laid down by this Court. It also followed the opinions of this Court in distinguishing the classification of businesses generally designated by the phrase "public utilities" from those businesses which are subject to regulation by a state as a proper exercise of its police powers. Thus, the

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[20] C. 313, 39 Stat. 486, *et seq.*, 7 U. S. C. §§ 241–273.

[21] Frankfurter, *loc. cit.*, *supra*, note 19.

Emergency Court of Appeals gave proper effect to the applicable decisions of this Court.

3. Petitioner suggests as an additional reason for the issuance of the writ that a division of opinion among judges of the Emergency Court of Appeals is comparable to conflicting decisions by circuit courts of appeals. This analogy is ingenious but unsound. In view of the exclusive jurisdiction of the Emergency Court of Appeals, only if that court were sitting in divisions, as it is authorized to do by Section 204 (c) of the Act, and conflicting decisions were rendered, would it be necessary for this Court to exercise its supervisory powers of review in order to resolve a conflict of decisions.

While it must be conceded that the issue raised here is of importance, the concurrence of the Administrator and the Emergency Court of Appeals as to the proper interpretation of a limitation on the Administrator's authority would appear to make review by this Court unnecessary. It is clear that the Administrator's interpretation of the Act is entitled to great weight. Approval of such an interpretation by the special court created to review the validity of the Administrator's regulations and orders should normally be sufficient to settle the controverted question.

CONCLUSION

The decision below is correct and does not warrant further review. The petition should therefore be denied.

Respectfully submitted.

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JULY 1943.

APPENDIX A

EMERGENCY PRICE CONTROL ACT OF 1942, C. 26, 56 STAT. 23

SECTION 302 (C)

(c) The term "commodity" means commodities, articles, products, and materials (except materials furnished for publication by any press association or feature service, books, magazines, motion pictures, periodicals and newspapers, other than as waste or scrap), and it also includes services rendered otherwise than as an employee in connection with the processing, distribution, storage, installation, repair, or negotiation of purchases or sales of a commodity, or in connection with the operation of any service establishment for the servicing of a commodity: *Provided*, That nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility, or (3) rates charged by any person engaged in the business of selling or underwriting insurance, or (4) rates charged by any person engaged in the business of operating or publishing a newspaper, periodical, or magazine, or operating a radio-broadcasting station, a motion-picture or other theater enterprise, or outdoor advertising facilities, or (5) rates charged for any professional services.

1 State	2 Electricity, Light, Power	3 Gas	4 Water	5 Communications	6 Common Carriers	7 Heat and Refrigeration	8 Warehouses (a) No Warehouses Included	8 Warehouses (b) Certain Warehouses Included	8 Warehouses (c) All Warehouses Included	9 Others
Alabama	X	X	X		X	X	X			Pub. wharves, docks
Arizona	X	X	X	X	X			Storage of cotton and wool.		
Arkansas	X	X	X	X	X	X	X			
California	X	X	X	X	X	X			X	Wharfage. "Every class of private corporations, individuals or associations of individuals hereafter declared by the Legislature to be public utilities."
Colorado	X	X	X	X	X		X			"every corporation now or hereafter declared by law to be affected with a public interest."
Connecticut	X	X	X	X	X		X			
Delaware [2]										
Florida: (a) Private Utilities.			X	X	X		X			
(b) Municipal Utilities.		X					X			Reservoirs, sewerage, pumping stations, wells; distribution systems, intakes, purification works; collecting systems, treatment and disposal works; airports, hospitals, jails, golf courses.
Georgia	X	X		X	X		X			Docks
Idaho	X	X	X	X	X			Warehouses used in connection with carriers and agricultural produce.		
Illinois	X		X	X	X	X		Grain Warehouses.		Wharfingers

[1] For statutory references see Appendix C.
[2] Delaware has neither statutory definition nor regulation.

1 State	2 Electricity, Light, Power	3 Gas	4 Water	5 Communications	6 Common Carriers	7 Heat and Refrigeration	8 Warehouses (a) No Warehouses Included	8 Warehouses (b) Certain Warehouses Included
Indiana	X		X	X	X	X		
Iowa	X			X	X	X	X	
Kansas	X		X	X	X	X	X	
Kentucky	X	X	X	X	X		X	
Louisiana		X		X	X		X	
Maine	X	X	X	X	X			Warehouses used in connection with common carriers.
Maryland	X	X	X	X	X		X	
Massachusetts	X	X	X	X	X		X	
Michigan	X	X	X	X	X		X	
Minnesota: (a) Private Utilities.							X	
(b) Municipal Utilities.	X	X	X	X	X	X	X	
Mississippi	X	X	X	X	X		X	
Missouri	X	X	X	X	X	X	X	
Montana	X		X	X	X	X	X	
Nebraska				X	X		X	
Nevada	X		X	X	X	X		Warehouses used in connection with common carriers.
New Hampshire	X		X	X	X	X	X	
New Jersey	X	X	X	X	X	X	X	

APPENDIX B.—ANALYSIS OF STATE STATUTORY DEFINITIONS OF "PUBLIC UTILITY"

4	5	6	7	8			9
				Warehouses			
Water	Communications	Common Carriers	Heat and Refrigeration	(a) No Warehouses Included	(b) Certain Warehouses Included	(c) All Warehouses Included	Others
X	X	X	X			X	
	X	X	X	X			Aeronautics
X	X	X	X	X			
X	X	X		X			
	X	X		X			
X	X	X			Warehouses used in connection with common carriers.		Wharfingers
X	X	X		X			
X	X	X		X			
X	X	X		X			Oil, river improvement, radio.
				X			
X	X	X	X	X			Ice, stone quarries, public markets and slaughter houses, pavement and sewer works, docks, depots.
X	X	X		X			
X	X	X	X	X			
X	X	X	X	X			Sewerage
	X	X		X			
X	X	X	X		Warehouses used in connection with common carriers.		Airships, radio, ditches, drainage systems, sewerage.
X	X	X	X	X			
X	X	X	X	X			Sewers

1	2	3	4	5	6	7	8			9
							Warehouses			
State	Electricity, Light, Power	Gas	Water	Communications	Common Carriers	Heat and Refrigeration	(a) No Warehouses Included	(b) Certain Warehouses Included	(c) All Warehouses Included	Others
New Mexico	X	X	X			X	X			Any mechanical plant p ing or refining agric products.
New York	X	X		X	X	X	X			
North Carolina: (a) Private utilities.	X	X	X	X	X	X	X			
(b) Municipal utilities.	X	X	X				X			Schools, libraries, ceme market houses, wharves grounds, parks, g plants, armories, audito abattoirs, sewer sy slaughter houses.
North Dakota	X	X	X	X	X	X		Warehouses for food and agricultural products.		
Ohio	X	X	X	X	X	X	X			Messenger service
Oklahoma	X	X	X	X	X		X			Cotton gins, oil, sewera other systems by whom owned or operated for use."
Oregon	X		X	X	X	X	X			
Pennsylvania	X	X	X	X	X	X	X			Wharves, sewerage
Rhode Island	X	X	X	X	X		X			
South Carolina	X	X	X		X	X	X			
South Dakota				X	X				X	
Tennessee	X	X	X	X	X		X			"any other like system, p equipment affected b dedicated to the pub under privileges, fran licenses or agreements g by the state or any p subdivision thereof."
Texas	X	X	X	X			X			Sewerage

	7	8 Warehouses			9
	Heat and Refrigeration	(a) No Warehouses Included	(b) Certain Warehouses Included	(c) All Warehouses Included	Others
	X	X			Any mechanical plant processing or refining agricultural products.
	X	X			
	X	X			
		X			Schools, libraries, cemeteries, market houses, wharves, playgrounds, parks, garbage plants, armories, auditoriums, abattoirs, sewer systems, slaughter houses.
	X		Warehouses for food and agricultural products.		
	X	X			Messenger service
		X			Cotton gins, oil, sewerage, "or other systems by whomsoever owned or operated for public use."
	X	X			
	X	X			Wharves, sewerage
		X			
	X	X			
				X	
		X			"any other like system, plant or equipment affected by and dedicated to the public use under privileges, franchises, licenses or agreements granted by the state or any political subdivision thereof."
		X			Sewerage

1	2	3	4	5	6	7	8 Warehouses			9
State	Electricity, Light, Power	Gas	Water	Communications	Common Carriers	Heat and Refrigeration	(a) No Warehouses Included	(b) Certain Warehouses Included	(c) All Warehouses Included	Others
Utah	X	X	X	X	X	X		Warehouses storing grain or used in connection with common carriers.		
Vermont	X	X	X	X	X		X			
Virginia	X	X	X	X	X		X			Internal improvements, "and all other persons or corporations having the power of eminent domain."
Washington	X	X	X	X	X			Warehouses used in connection with transportation by water.		Wharfingers
West Virginia	X	X	X	X	X		X			Radio..wharves and any business "which is or shall hereafter be held to be a public service."
Wisconsin	X		X	X		X	X			
Wyoming	X	X	X	X	X	X	X			
District of Columbia	X	X	X	X	X		X			
Total	44	37	42	45	45	24	37	8	3	

APPENDIX C

STATUTORY REFERENCES UNDERLYING APPENDIX B

State	*Statutory Reference*
Alabama	Code (1940) Title 48, § 302.
Arizona	Code (1939) § 69–201; § 52–901.
Arkansas	Dig. Stat. (Pope 1937) § 2064 (d).
California	State Const. Art. XII, § 23; Gen. Laws (1937 Deering) Act No. 6386 § 2½.
Colorado	Stat. Ann. (1935), Ch. 137, §§ 3, 4.
Connecticut	Gen. Stat. (Rev. 1930) § 3577.
Delaware	———
Florida	Stat. 1941, Title 25. Ibidem, § 180.07.
Georgia	Code Ann. § 93–307.
Idaho	Code Ann. (1932) §§ 59–128, 59–129; § 67–202.
Illinois	Ill. Stat. Ann. (Jones) § 112.027.
Indiana	Stat. Ann. (Burns' 1933), § 54–105.
Iowa	Code (1939), § 7874.
Kansas	Gen. Stat. Ann. (1935) §§ 66–104, 66–105.
Kentucky	Ky. Stat. Ann. (Baldwin 1936), § 3952–1.
Louisiana	Gen. Stat. (Dart's, 1939) §§ 7912, 7980–7997, 7997.1–11.
Maine	Rev. Stat. (1930) Ch. 62, § 15.
Maryland	Code Ann. (Flack, 1939) Art. 23, § 349.
Massachusetts	Ann. Laws (1933) Ch. 159, 159A and B, 160–166.
Michigan	Stat. Ann. § 22.13 (6).
Minnesota	Stat. (Mason 1927) §§ 1311, 1484, and 1786.
Mississippi	Code (1930) § 2455, Supp. (1938) Ch. 154–A.
Missouri	Stat. Ann., Vol. 9, Ch. 33, §§ 5122, 5136.
Montana	Rev. Code (1935) § 3881.
Nebraska	Comp. Stat. (1929) § 75–1302.
Nevada	Comp. Laws (1929) § 6106.
New Hampshire	Pub. Laws (1926), Ch 236, § 4, as amended by L. 1941, Ch. 197.
New Jersey	Gen. Stat. Ann. § 48:2–13.
New Mexico	Laws 1941, Ch. 84; Stat. Ann. (1929), § 134–1125, Const., Art. 11 § 7.
New York	Public Service Law § 2, Subdivision 22; Tax Law § 186a.
North Carolina	Code (1939) § 1112 (1) and § 2832.

North Dakota	Comp. Laws (1913) (1925 Supp.) § 4609-C-2.
Ohio	Gen. Code (Page) §§ 614-2-2a, 5415.
Oklahoma	Stat. Ann., Title 17, §§ 41, 151; Title 21, § 1265.1.
Oregon	Comp. Laws Ann. (1940) §§ 112-401, 114-101.
Pennsylvania	Pa. Stat. (Purdon), Title 66, § 1102, Subdivision 17.
Rhode Island	Gen. Laws (1938) Ch. 122, § 2.
South Carolina	Code of Laws (1932) §§ 8252, 8555-1.
South Dakota	Code (1939), § 52.0201.
Tennessee	Tenn. Code Ann. (Williams 1932), § 5448.
Texas	Tex. Stat. (Vernon 1936) Title 32, Ch. 10.
Utah	Rev. Stat. (1933) § 76-2-1.
Vermont	Pub. Laws (1933) §§ 6085, 6706 IIIb.
Virginia	Code (1936) (1940 Supp.) § 3881.
Washington	Rev. Stat. Ann. (Remington) § 10344.
West Virginia	Code (1937) §§ 2546, 2553.
Wisconsin	Stat. 1941, § 196.01.
Wyoming	Rev. Stat. (1931) § 94-101.
District of Columbia	D. C. Code (1940) § 43-103; 37 Stat. 974, Ch. 150, § 8.

U. S. GOVERNMENT PRINTING OFFICE : 1943

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute and regulation involved	2
Statement	2
Summary of argument	5
Argument	7
I. The Administrator properly interpreted the exemption of "rates charged by any common carrier or other public utility" in Section 302 (c) as having uniform application to certain types of businesses, generally and traditionally regarded as public utilities, irrespective of variations of state or local law with respect to their characterization or legal obligations	7
II. Applying the foregoing principle, the Administrator correctly determined that warehouses as such are not public utilities within the scope of the "public utility" exemption	19
Conclusion	25
Appendix A	26
Appendix B	28
Appendix C	29

CITATIONS

Cases:	
Chicago Board of Trade v. *Johnson*, 264 U. S. 1	9
DeGanay v. *Lederer*, 250 U. S. 376	8
Eagan v. *Commissioner of Internal Revenue*, 43, F. (2d) 881	21
Jerome v. *United States*, 318 U. S. 101	9, 11
Keifer & Keifer v. *Reconstruction Finance Corporation*, 306 U. S. 381	9
Lyeth v. *Hoey*, 305 U. S. 188	9
Morgan v. *Commissioner of Internal Revenue*, 309 U. S. 78	9
Nebbia v. *New York*, 291 U. S. 502	23
Patrick Cudahy Family Company v. *Bowles*, decided by Emergency Court of Appeals, November 2, 1943	10
Pulitzer Publishing Company v. *Federal Communications Commission*, 94 F. (2d) 249	23

559505—43——1

Statutes; Page

Emergency Price Control Act of 1942, 56 Stat. 23, 50 U. S. C. App., Supp. II, § 901 *et seq.*:
- Sec. 2 — 19
- Sec. 204 (d) — 10, 26
- Sec. 302 (c) — 5, 6, 7, 8, 10, 12, 15, 19, 20, 26

United States Warehouse Act, c. 313, 39 Stat. 486, *et seq.*, 7 U. S. C. §§ 241–273 — 21

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49 Stat. 838, 15, U. S. C. § 79b (a) (5) — 21

52 Stat. 589, 48 U. S. C. § 315 — 21

52 Stat. 891, 11 U. S. C. §§ 577, 578 — 21

53 Stat. 48, 26 U. S. C. § 116(d) — 21

56 Stat. 765, 50 U. S. C. App. § 961 — 14, 15

State Constitution and Statutes:

Constitution of California.
- Article IV, Section 33 — 2
- Article XII, Section 23 — 2

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- Sec. 2 (aa) — 2
- Sec. 2 (dd) — 2
- Sec. 2½ — 2
- Sec. 14 — 2
- Sec. 15 — 2
- Sec. 63 (a) — 2

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87 Cong. Rec., November 24, 1941, 9308 — 14

88 Cong. Rec., January 7, 1942, 68 — 21

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 112

DAVIES WAREHOUSE COMPANY, PETITIONER

v.

CHESTER BOWLES, PRICE ADMINISTRATOR

ON WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 109–144) is reported in 137 F. (2d) 201.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered May 28, 1943 (R. 145). The petition for a writ of certiorari was filed on June 21, 1943, and granted on October 11, 1943. Jurisdiction of this Court rests on Section 204 (d) of the Emergency Price Control Act of 1942, 56 Stat. 23.

QUESTION PRESENTED

Whether petitioner, a public warehouse company in California, is a "public utility" within the meaning of Section 302 (c) (2) of the Emergency Price Control Act, and hence exempt from the Administrator's authority under the Act.

STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Emergency Price Control Act appear in Appendix A, *infra*, pp. 26–27. The applicable provisions of the regulation involved, the General Maximum Price Regulation, appear in the Record at pp. 48–50 and 59.

STATEMENT

Petitioner is engaged as a public warehouseman in Los Angeles, California. Its business is declared by both constitution [1] and statute [2] of that state to be that of a "public utility" subject to the authority of the Railroad Commission of California. Within the Commission's authority is included the fixing of petitioner's rates and charges. Pursuant to the state statute the Railroad Commission, on May 12, 1942, authorized an increase in petitioner's charges, effective May 22, 1942. (R. 109.)

[1] Constitution of California, Article IV, Section 33; Article XII, Section 23 (R. 17–19, 109).

[2] Public Utilities Act of California, Sections 2 (aa), 2 (dd), 2½, 14, 15, 63 (a) (R. 16–17, 109).

On April 28, 1942, the Price Administrator, acting under the authority conferred upon him by the Emergency Price Control Act, issued the General Maximum Price Regulation[3] (R. 46–75) which established as maximum prices of the commodities and services governed by that Regulation the highest prices charged by each seller for the particular commodity or service during March 1942. Section 10 of that Regulation, as amended (R. 59), provided that it should not apply to such services as might be specified by supplementary regulation or amendment thereto. On June 16, 1942, the Administrator issued Supplementary Regulation No. 11[4] (R. 97), providing that the General Maximum Price Regulation should not apply to certain services, including warehousing, until July 1, 1942.

Amendment No. 1 to Supplementary Regulation No. 11 (R. 101–105), issued June 23, 1942, exempted certain services from the operation of the General Maximum Price Regulation effective July 1, 1942. Of the businesses whose services were excepted by the amendment, the only ones partaking of the nature of a common carrier or other public utility were the following:

> (21) Electricity (companies furnishing, as public utilities), rates charged by
>
> * * * * *

[3] 7 F. R. 3153.
[4] 7 F. R. 4738.

(25) Express companies and freight forwarders offering their services to the general public as common carriers, rates charged by

* * * * *

(30) Gas (companies supplying, as public utilities through mains), rates charged by

* * * * *

(38) Light, heat, or power (companies furnishing, as public utilities), rates charged by

* * * * *

(61) Telephone services, rates charged for

(62) Telegraph services, rates charged for

* * * * *

(68) Transportation of commodities by persons offering their services to the general public as common carriers by rail, water, motor, pipe line, or other means of conveyances, rates charged for; Provided, however, that charges for storage and warehousing and all other services incident thereto by any person shall not be excluded from the General Maximum Price Regulation.

(69) Transportation of persons, rates charged for

* * * * *

(73) Water (companies supplying, to urban areas as public utilities), rates charged by

* * * * * *

Among the services not excepted were "commercial storage and warehousing and services incident thereto" (R. 97). The effect of the General Maximum Price Regulation and Supplementary Regulation No. 11, as amended, was to prohibit petitioner, after July 1, 1942, from charging the increased rates which had been approved by the California Railroad Commission. Petitioner filed a timely protest to the General Maximum Price Regulation asserting itself to be a public utility within the meaning of Section 302 (c) of the Act, and, therefore, exempt from the Administrator's authority (R. 15–40). The protest was denied by the Administrator (R. 41–45) and petitioner filed a complaint in the Emergency Court of Appeals (R. 1–12). That complaint was dismissed, the court holding that petitioner was not a public utility within the meaning of Section 302 (c) (2) of the Act (R. 109–145).

SUMMARY OF ARGUMENT

I

The Administrator properly interpreted the exemption of "rates charged by any common carrier or other public utility" in Section 302 (c) of the Act as having uniform application to certain types

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of businesses, generally and traditionally regarded as public utilities, irrespective of variations of state or local law with respect to their characterization or legal obligations. This construction follows the general rule that the content of descriptive terms in federal statutes should not be varied by local law, and is supported by the provisions of the statute and its legislative history affirmatively indicating that Congress recognized the importance to the price-control program of nation-wide uniformity of authority and consistency in administration. The practical necessities of the price-control program also favor the construction adopted by the Administrator. By way of contrast, the tests offered by petitioner tend toward confusion and uncertainty in the administration of the program and accord less closely with the statutory provisions and the Congressional intention. Under those tests the authority to regulate each type of enterprise would vary in accordance with local circumstance and local law. Finally, the Administrator's interpretation is supported by the well-settled rule that statutory exemptions should be narrowly construed.

II

The Administrator correctly determined that warehouses are not within the group of businesses generally and traditionally regarded as public utilities, within the meaning of Section 302 (c) of the Act. This is demonstrated by the particular

section of which the exemption forms a part, as well as by the general understanding of the term "public utility." Section 302 (c) of the statute expressly subjects "storage" services to regulation. In referring specifically to storage services, Congress clearly intended to include warehouse rates within the scope of the Administrator's authority. Congressional usage of the term "public utility" in this statute to include certain traditional public utilities, but not to include warehouses, is no different from its understanding in other federal statutes. It also accords with the generally accepted understanding of the term "public utility" as indicated by the statutory definitions of the vast majority of state legislatures, by the opinions of this and other Federal courts and by the usage of the business community.

ARGUMENT

I

THE ADMINISTRATOR PROPERLY INTERPRETED THE EXEMPTION OF "RATES CHARGED BY ANY COMMON CARRIER OR OTHER PUBLIC UTILITY" IN SECTION 302 (C) AS HAVING UNIFORM APPLICATION TO CERTAIN TYPES OF BUSINESSES, GENERALLY AND TRADITIONALLY REGARDED AS PUBLIC UTILITIES, IRRESPECTIVE OF VARIATIONS OF STATE OR LOCAL LAW WITH RESPECT TO THEIR CHARACTERIZATION OR LEGAL OBLIGATIONS

The Office of Price Administration, throughout its administration of the Emergency Price Control

Act, has consistently interpreted the "public utility" exemption of Section 302 (c)[5] as referring to a group of businesses which have been traditionally regarded as public utilities and which are generally suggested when the term "public utility" is used. Thus, the Administrator has taken the words "public utility" in their "ordinary and usual sense, and with the meaning commonly attributable to them," *DeGanay* v. *Lederer*, 250 U. S. 376, 381, and has avoided both refinements of legal analysis and the variations of local law[6] which, as will be seen, are necessarily involved in the use of the term "public utility" as a word of art, after the fashion suggested by the petitioner or elaborated by the dissenting opinion in the court below. We believe that the interpretation adopted by the Administrator is preferable to those suggested by the petitioner or by the dissenting opinion in that it more closely accords with general principles of statutory interpretation, with the legislative history of the Emergency Price Control Act, and with the larger purposes and administrative necessities of the Act.

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[5] *Infra*, p. 26.

[6] See the illustrations of some of the businesses designated by state statutes as public utilities and regulated as such, collected in the opinion of the court below (R. 112). They range from "abattoirs" to "wells." See particularly Colorado Stat. Ann. (1935), Ch. 137, Section 3, defining as a public utility "every corporation or person now or hereafter declared by law to be affected with a public interest."

This Court has frequently given expression and application to the general rule that descriptive terms in federal statutes, in the absence of plain indication to the contrary, should be accorded a general and uniform interpretation and should not be made dependent upon varying state laws in their application. *Jerome* v. *United States*, 318 U. S. 101, 104; *Morgan* v. *Commissioner of Internal Revenue*, 309 U. S. 78; *Lyeth* v. *Hoey*, 305 U. S. 188; *Chicago Board of Trade* v. *Johnson*, 264 U. S. 1. It is particularly appropriate that this general rule of construction be followed in the interpretation of the Emergency Price Control Act, a statute enacted under the war power of Congress and designed to meet a problem nation-wide both in its causes and in its effects. It is certainly reasonable to assume that if Congress had intended to condition the authority to cope with problems of wartime inflation upon variations of local law, it would have expressly so provided. *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306 U. S. 381, 395. The language of the Act contains no hint that Congress so intended.

There are, on the contrary, affirmative indications in the statute that Congress recognized the importance to price control of national uniformity of authority and consistency in administration. Largely to avoid the unfortunate practical effects of conflicting judicial decisions in different parts

of the country, the Emergency Court of Appeals was established with exclusive jurisdiction, subject only to review by this Court, to determine the validity of price or rent regulations or orders.[7] Thus Congress recognized the administrative impracticability of applying price regulations to one part of an industry while another part of the same industry is even temporarily free from regulation. It is also worthy of note that all the other exemptions provided for in Section 302 (c) apply uniformly throughout the country, irrespective of variations in local law.[8] The "public utility" exemption should not be given an interpretation inconsistent with this basic statutory pattern, merely because the term "public utility", for reasons foreign to price control, is sometimes used as a word of art with connotations more subtle and variable than its ordinary meaning.

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[7] Emergency Price Control Act, Section 204 (d), 50 U. S. C. App., Supp. II, § 924 (d), *infra*, p. 26. In explaining this provision, the Report of the Senate Committee on Banking and Currency states, "the Emergency Court is established to avoid the confusion which would result from conflicting decisions in different circuits on the same regulations." Sen. Rep. No. 931, 77th Cong., 2d Sess. (1942), pp. 7, 16.

[8] Cf. *Patrick Cudahy Family Company* v. *Bowles*, decided by the Emergency Court of Appeals, November 2, 1943, where the court, approving the Administrator's determination that a provision of the maximum rent regulations should have a uniform interpretation throughout the country, rejected the complainant's contention that the meaning of the phrase "for a term commencing on or prior to" in the regulations should vary with the laws of particular states.

[9] It is interesting to note that by Section 302 (c) (4) the rates of all radio-broadcasting stations (whether or not sub-

The petitioner suggests, however, that its interpretation likewise calls for a general and uniform application of the exemption clause, because in any state where a business is regulated as a public utility it will be exempt from the Emergency Price Control Act, whereas in every state where the same business is not so regulated it will be subject to the Price Control Act. This is uniformity only in the sense of abstract definition. It is not uniformity in the sense of practical application as contemplated by Congress. Cf. *Jerome* v. *United States, supra.* As a practical matter, the Administrator's interpretation results in each type of business being subject to or exempt from price control irrespective of where it is situated or how it is characterized or regulated by state, municipal, or other local law. Under the petitioner's interpretation, as well as that elaborated by Judge Vinson, the authority to regulate each type of enterprise—warehouses, for example—would vary in accordance with local circumstance and local law. But price control is an intensely practical matter; it is concerned with the economic functions which a business performs, not with its legal ramifications. Thus the unjustified economic preferences and regional dislocations which may result from

ject to state regulation) are exempted from the Administrator's authority. However, since such enterprises are regulated in several states (*e. g.*, Michigan, Nevada, and West Virginia; see Appendix B, *infra*) as "public utilities", under petitioner's test they would also be exempt under the "public utility" provision of the statute.

subjection of one part of an industry to price control while its economic counterpart and perhaps its competitor is not so subject, are not less objectionable merely because one part of the industry is accorded "public utility" status and the other is not.

Petitioner has also argued that its interpretation will best serve the general purposes of the statute because under it those enterprises which are subject to adequate price regulation under some other law will not be subject to the Emergency Price Control Act, whereas even public utility enterprises which are not subject to other price regulation will be subject to the Administrator's authority under the Act. In the first place, however, there is nothing in the statute to suggest that Congress intended subjection to other regulation to be the touchstone of exemption under the Act. Congress did not provide that enterprises not already subject to regulation should be subject to the Administrator's authority; or, conversely, that the Administrator's authority should not extend to those enterprises which were already subject to regulation. As petitioner acknowledges, the existence of other price or rate regulation does not itself establish the right to exemption; similarly, it is clear on the face of Section 302 (c) that certain classes of enterprises which are ordinarily not subject to price or rate regulation are nevertheless exempted from the Act. In the second place, the existence of state regulation is

itself no guarantee that the purposes of the Price Control Act will be well served. For example, an increase in warehouse rates in one state which is inconsistent with the level of warehouse rates in other states insisted upon by the Price Administrator is no less detrimental—indeed, may be more detrimental—to effective price control because the increase is under the aegis of state or local authority. Congress was doubtless aware that the success of the stabilization program depended very largely upon a wise but firm accommodation of conflicting interests, frequently reflected in sectional or geographical differences. This accommodation is not furthered by making the Price Administrator's authority dependent upon state or local regulatory action.

Nor does the legislative history of the statute support the petitioner's proposition that Congress intended the scope of the exemption for common carrier and other public utility rates to be determined by the existence or nonexistence of state or local rate regulation. Discussions at the committee hearings and in the legislative debates indicate, it is true, recognition of the fact that for the most part the businesses exempted by this provision would be subject to state regulation. But they also indicate recognition that some businesses outside the scope of the public utility exemption would be subject to state regulation, and that some businesses not subject to such regulation would

nevertheless be entitled to the exemption.[10] Furthermore, in Section 1 of the amendatory Act of October 2, 1942, after the Administrator's interpretation of the exemption had been publicly established for several months, the phrase "common

[10] See Hearings before the House Committee on Banking and Currency on H. R. 5479, superseded by H. R. 5990, 77th Cong., 1st Sess. (1941) 626:

"Mr. PATMAN. * * * You include in this bill metals, chemicals, durable goods, and agricultural products, and * * * services * * * but it does not include transportation or utility rates.

"Mr. HENDERSON. No.

"Mr. PATMAN. That is quite a large item, and you said, as I understood you, that you were satisfied with the rate-making bodies in the States, and that that was the reason you did not ask that utility and transportation rates be included.

"Do I understand that correctly?

"Mr. HENDERSON. I did not mean to limit it to existing regulatory mechanisms both in transportation and utilities.

"What I said was that the transportation rates themselves were already under regulation by Federal and State agencies, and I also feel that that is not an item, *even in the absence of that regulation*, to be brought under commodity price regulation."

See also 87 Cong. Rec., November 24, 1941, at 9308, where the chairman of the House Committee on Banking and Currency, in explaining the bill, stated:

"The bill also provides explicitly in Section 302 (c) that nothing in the act is to be construed to authorize the regulation of compensation paid by an employer to any of his employees, or the regulation of rates charged by any common carrier, or other public utility, which are *usually* subject to adequate control by State or other Federal agencies. In cases of conflict between State regulation of enterprise of a nonpublic-utility character and Federal regulation under this bill, the Federal regulation would, of course, prevail." [Italics supplied.]

carrier or other public utility" was again used without qualification or definition.[11] During the debates on this measure the Senate was expressly told[12] that the Administrator had construed Section 302 (c) (2) of the Act as exempting from his authority a telephone company which was not subject to state regulation.[13] Legislative repetition of the phrase under these circumstances is persuasive indication of Congressional approval of the existing administrative construction.

[11] 56 Stat. 765, 50 U. S. C. App. § 961. The original lack of any supervision by the Administrator over "public utility" rate increases was deemed unsatisfactory, as the enactment of the October 2, 1942 statute indicates. But while the Administrator was given important functions in that field (see note 13, *infra*; cf. *Vinson* v. *Washington Gas Light Co.*, No. 396, present Term), the scope of the phrase "public utility" was left unchanged.

[12] 88 Cong. Rec., September 10, 1942, 7343–7346; Petitioner's Brief, Appendix A, pp. vii to xx.

[13] Under the Act of October 2 every common carrier or other public utility, whether regulated or unregulated by state or local law, is required to serve notice upon the Administrator before effecting rate increases above September 15, 1942, levels. Accordingly, the Administrator has consistently required the filing of such notices by all common carriers and public utilities regardless of whether their rates are subject to control by state or local authority (Procedural Regulation No. 11, 7 F. R. 9390). Thus the Administrator is assured of an opportunity not only of persuading unregulated carriers or utilities to refrain from effecting increases—as was done in the telephone case referred to in the Administrator's letter to Senator Norris (*supra*), n. 12)—but also of bringing suit in equity to restrain unreasonable rate increases by them, if necessary. Cf. opinion of the court below, R. 115.

The test elaborated in the dissenting opinion, although it depends essentially on local law, accords no weight to the existence of price or rate regulation; there are, however, additional considerations which render that test administratively inapt in the context of the Emergency Price Control Act. Judge Vinson's discussion of the meaning of the phrase "other public utility" as used in the Emergency Price Control Act concludes with this "definitive summary" (R. 129–130):

> * * *. This, then, is my exact position: If a business is (1) affected with a public interest; *and* (2) bears an intimate connection with the processes of transportation and distribution, *and* (3) is under an obligation to afford its facilities to the public generally, upon demand, at fair and non-discriminatory rates, *and* (4) enjoys, in a large measure an independence and freedom from business competition brought about either (a) by its acquirement of a monopolistic status, or (b) by the grant of a franchise or certificate from the State placing it in this position, it is for the purposes of the Price Control Act, as amended, a public utility, and subject to the exemption provisions of Section 302 (c).
>
> It is these four attributes which make up the bundle or the public utility formula to the extent which I have promulgated it. The formula is a limited one. It is designed only to provide an absolute test

> or standard by which one may *affirmatively* determine that a particular business *is* a public utility. I do not wish to be misunderstood as indicating that a business possessed of or operating under less than the total of these features may not be considered a public utility. My formula has no negative or exclusive implications. What I do say is that, at least, *any* business which *does* possess and practice and operate under each and all of these features, is by a preponderance of considered judicial opinion a business in the public utility class. * * * [Italics in original.]

In considering the impracticability of this test for the purposes of price control, it is of first importance to note the statement that the formula laid down "has no negative or exclusive implications". If the Administrator were to adopt such an "open-end" definition, doubt and confusion would be rampant in a large field of enterprise; effective enforcement would be frustrated because many businesses under some color of right would consider themselves public utilities. On the other hand, if the Administrator were to declare just which of these attributes are necessary in order to obtain public utility status, he would commit himself to the resolution of a host of complex questions, both of law and of fact, all unrelated to the real business of price control. At the very least, he would have to face the question whether the particular business concerned was sufficiently

"affected with a public interest" constitutionally to justify the type of legal obligation which the state imposes; and would have to scrutinize and differentiate many kinds of franchises. Thus, the Administrator, as incident to the task of price control, would be called upon to determine in any number of particular instances questions of state law which require the most painstaking examination of statutes and decisions, and questions of constitutional law which have produced some of the sharpest divisions of this Court and are not yet wholly laid at rest. Surely, the impracticability of such an undertaking is persuasive evidence that the Congress did not intend to impose it upon the Administrator, and persuasive argument against importing such a construction into the statute.

By interpreting the public utility exemption as applying to a specific group of businesses and by designating those businesses which it was believed Congress intended to include within the scope of the term, the Administrator has given to the exemption that clarity and precision which is eminently necessary both to those who administer the statute and to those who must obey it. In addition, the general principles that the interpretation of a statute by the agency charged with its administration is entitled to great weight and that in a statute of broad application exemptions are to be strictly construed, reinforce the conclusion that the Administrator should not be required to

abandon the interpretation which he has consistently followed for the nebulous alternatives that have been suggested.

II

APPLYING THE FOREGOING PRINCIPLE, THE ADMINISTRATOR CORRECTLY DETERMINED THAT WAREHOUSES AS SUCH ARE NOT PUBLIC UTILITIES WITHIN THE SCOPE OF THE "PUBLIC UTILITY" EXEMPTION

In giving specific content to the term "public utility" as used in Section 302 (c) (2) of the Act, the Administrator concluded that Congress intended the term to refer only to those businesses which have been generally and traditionally regarded as public utilities. As members of that group, the Administrator included enterprises furnishing to the public, gas, electricity, light, heat or power, telephone and telegraph services, and water. Warehouses were not included. We submit that the specific provisions of the Act, as well as general usage of the term "public utility," justify the conclusion of the Administrator and the court below that charges for warehousing services were not intended to fall within the statutory exemption.

The language and legislative history of Section 302 (c) provide persuasive evidence that Congress intended warehouse services to be subject to the Administrator's authority. By the definition in Section 302 (c) storage services are specifically enumerated as included within the term "com-

modity," maximum prices for which they may be established pursuant to Section 2 of the Act. It is unquestioned that public warehouses render the bulk of storage services (R. 43). The claim that the rates for such services were removed from the Administrator's authority by the public utility exemption must, therefore, impute to Congress a specific grant of authority with the one hand, and its virtual simultaneous removal with the other. Moreover, when storage services were called to the attention of Congress, the rates therefor were referred to only as subject to the maximum price authority established in the Act.[14] On the other hand, on those occasions when the public utility clause was the subject of discussion, the traditional public utilities, such as gas, electric, light and power, telephone and water companies were men-

[14] During the Senate hearings Mr. Henderson stated expressly that "warehousing" was one of the services which would be subject to regulation. Hearings before the Committee on Banking and Currency, U. S. Senate, on H. R. 5990, 77th Cong., 1st Sess. (1941) 121–122. The term "service establishment", in Section 302 (c), is considered in the Report of the Senate Banking and Currency Committee and stated to "include all establishments rendering services in connection with the use of goods, including such typical establishments as laundries, cleaners and dyers, and other such establishments listed as service establishments by the United States Census." S. Rep. No. 931, 77th Cong., 2d Sess. (1942) p. 16. The United States Census includes "warehousing" in its list of service establishments. Reports on Business, Census of Business; 1939, Vol. 3, *Service Businesses*, U. S. Dept. of Commerce, 16th Census (1940), p. 244.

tioned without any suggestion that warehousing rates might also be included.[15] This legislative background reflects a Congressional understanding that the public utility exemption would not apply to warehousing services.

This understanding of the term "public utility" as used in the Emergency Price Control Act is in accord with previous Federal legislation with respect to warehouses. By the United States Warehouse Act, certain aspects of the activities of warehouses storing agricultural commodities have been regulated.[16] In this statute the usual attributes of public utility regulation are conspicuously absent. Indeed, the administrative sanction provided—the suspension of licenses for unreasonably high charges—is utterly inconsistent with any notion "of securing for society those essential services which are furnished by public utilities."[17] Moreover, while Congress has had occasion to define and regulate many businesses as "public utilities,"[18] warehouses have never been defined or regulated as such.

In addition to these guides to the Congressional understanding of the term "public utility," a good

[15] 88 Cong. Rec., January 7, 1942, at 68; 88 Cong. Rec., September 10, 1942, at 7343, 7344.

[16] C. 313, 39 Stat. 486, *et seq.*, 7 U. S. C. §§ 241–273.

[17] Frankfurter, *The Public and Its Government* (1930), 81.

[18] See, *e. g.*, 49 Stat. 838, 15 U. S. § 79b (a) (5); 53 Stat. 48, 26 U. S. C. § 116 (d); 40 Stat. 893, 10 U. S. C. § 1287; 52 Stat. 891, 11 U. S. C. §§ 577, 578; 48 Stat. 1001, 19 U. S. C. § 81n; 52 Stat. 589, 48 U. S. C. § 315.

indication of the common understanding of the term may be found in the use made of it generally by the state legislatures. Cf. *Eagan* v. *Commissioner of Internal Revenue*, 43 F. (2d) 881, 883 (C. C. A. 5). This is particularly true because the term "public utility" has been defined by statute or constitution in forty-eight jurisdictions.[19] Forty-four jurisdictions include electric light and power companies in their definition of public utilities; forty-five jurisdictions include common carriers. A like number include telephone and telegraph companies; forty-two include water companies, while thirty-seven include gas companies in their statutory definitions. The treatment of warehouses by state legislatures is noteworthy by way of contrast.[20] Only three states include all warehouses in their statutory definition of public utilities; eight include sharply limited types of warehouses in their statutory definition. Thirty-six states, as well as Congressional statutes for the District of Columbia, make no mention of warehouses at all in their statutory definitions.[21]

[19] See Chart set forth as Appendix B, *infra*.

[20] See Appendix B.

[21] The chart attached to petitioner's brief as Appendix B is misleading. In the column headed "Warehouses" reference is made to 22 states which regulate the rates of certain warehouses. The inference is that such rate regulation constitutes a state classification of warehouses as "public utilities." The exercise of a state power to regulate the rates and

The opinions of the federal courts express the same understanding of the term as the overwhelming majority of the legislatures. In *Nebbia* v. *New York*, 291 U. S. 502, this Court differentiated public utilities from other businesses subject to state regulation, expressly enumerating those within the former category. After pointing out that the dairy industry was not "in the accepted sense of the phrase, a public utility" (p. 531), the Court went on to say (p. 534):

> In the same volume [as *Munn* v. *Illinois*] the court sustained regulation of railroad rates. * * * Plainly the activities of railroads, their charges and practices, so nearly touch the vital economic interests of society that the police power may be invoked to regulate their charges, and no additional formula of affection or clothing with a public interest is needed to justify the regulation. *And this is evidently true of all business units supplying transportation, light, heat, power and water to communities, irrespective of how they obtain their powers.* [Italics supplied.]

Substantially similar judicial recognition of the scope of the term "public utility" was expressed in *Pulitzer Publishing Company* v. *Federal Com-*

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charges of a particular business does not constitute such a business, in the conventional sense of the phrase, a public utility. *Nebbia* v. *New York*, 291 U. S. 502, 531. Furthermore, states are included in this column although only limited classes of warehouses are regulated.

munications Commission, 94 F. (2d) 249 (App. D. C.), where the court stated (p. 251):

> But we have never said that a radio broadcasting station is a public utility in the sense in which a railroad is a public utility. Generally speaking, that term comprehends any facility employed in rendering quasi public service such as waterworks, gas works, railroads, telephones, telegraphs, etc. * * *

Of course, the term "public utility" may even to the layman have many different connotations; this is indicated by various dictionary and encyclopaedia definitions.[22] However, the various sources already referred to indicate that the Administrator adopted the most generally accepted meaning of the term. It is also worthy of note, particularly in the context of price control, that the usage of the business community closely accords with the meaning adopted by the Price Administrator. Financial manuals have generally grouped under the heading of public utilities the same industries which the Price Administrator has considered within the public utility exemp-

[22] See, for example, the definitions of "public utility" in Webster's *New International Dictionary* (2d ed., unabridged); Winston's *Cumulative Loose-Leaf Encyclopaedia* (App.) 780; *Oxford Universal English Dictionary* (1937) 1614; *New Century Dictionary* (Vol. 2) 1423; Compton's *Pictured Encyclopaedia* (1942), Vol. 11, p. 364; *New International Encyclopaedia* (1930), Vol. 19, p. 347; and *Encyclopaedia Americana,* Vol. 22, pp. 778–779.

tion and have generally classified warehouses as industrials.[28] Thus, examination of all relevant sources leaves no serious question but that inclusion of warehouses within the group of businesses exempted as public utilities would have done violence to the statutory language and been contrary to the legislative intention.

CONCLUSION

For the foregoing reasons the judgment below should be affirmed.

Respectfully submitted.

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NOVEMBER 1943.

[28] Moody's *Manual of Public Utilities* (1942 ed.), pp. a3, a83–a91. See also Standard and Poor's *Trade and Security Index for 1941.*

APPENDIX A

EMERGENCY PRICE CONTROL ACT OF 1942, c. 26, 56 Stat. 23, 50 U. S. C. App., Supp. II, § 901 *et seq.*

Section 204 (d)

* * * The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. * * *

Section 302 (c)

The term "commodity" means commodities, articles, products, and materials (except materials furnished for publication by any press association or feature service, books, magazines, motion pictures, periodicals and newspapers, other than as waste or scrap), and it also includes services rendered otherwise than as an employee in connection with the processing, distribution, storage, installation, repair, or negotiation of purchases or sales of a commodity, or in connection with the operation of any service establishment for the servicing of a commodity: *Provided,* That nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an em-

ployer to any of his employees, or (2) rates charged by any common carrier or other public utility, or (3) rates charged by any person engaged in the business of selling or underwriting insurance, or (4) rates charged by any person engaged in the business of operating or publishing a newspaper, periodical, or magazine, or operating a radio-broadcasting station, a motion-picture or other theater enterprise, or outdoor advertising facilities, or (5) rates charged for any professional services.

1 State	2 Electricity, Light, Power	3 Gas	4 Water	5 Communications	6 Common Carriers	7 Heat and Refrigeration	8 Warehouses (a) No Warehouses Included	8 Warehouses (b) Certain Warehouses Included	8 Warehouses (c) All Warehouses Included	9 Others
Alabama	X	X	X		X	X	X			Pub wharves, docks
Arizona	X	X	X	X	X			Storage of cotton and wool.		
Arkansas	X	X	X	X	X	X	X			
California	X	X	X	X	X	X			X	Wharfage, "Every class of private corporations, individuals or associations of individuals hereafter declared by the Legislature to be pubile utilities."
Colorado	X	X	X	X	X		X			"every corporation now or hereafter declared by law to be affected with a public interest."
Connecticut	X	X	X	X	X		X			
Delaware [2]										
Florida: (a) Private Utilities			X	X	X		X			
(b) Municipal Utilities.		X					X			Reservoirs, sewerage, pumping stations, wells, distribution systems, intakes, purification works, collecting systems, treatment and disposal works, airports, hospitals, jails, golf courses.
Georgia	X	X		X	X		X			Docks
Idaho	X	X	X	X	X			Warehouses used in connection with carriers and agricultural produce.		
Illinois	X		X	X	X	X		Grain Warehouses.		Wharfingers

1 State	2 Electricity, Light, Power	3 Gas	4 Water	5 Communications	6 Common Carriers	7 Heat and Refrigeration	8 Warehouses (a) No Warehouses Included	8 Warehouses (b) Certain Warehouses Included
Indiana	X		X	X	X	X		
Iowa	X			X	X	X	X	
Kansas	X		X	X	X	X	X	
Kentucky	X	X	X	X	X		X	
Louisiana		X		X	X		X	
Maine	X	X	X	X	X			Warehouses used in connection with common carriers.
Maryland	X	X	X	X	X		X	
Massachusetts	X	X	X	X	X		X	
Michigan	X	X	X	X	X		X	
Minnesota: (a) Private Utilities.	X			X	X		X	
(b) Municipal Utilities.	X	X	X	X	X	X	X	
Mississippi	X	X	X	X	X		X	
Missouri	X	X	X	X	X	X	X	
Montana	X		X	X	X	X	X	
Nebraska				X	X		X	
Nevada	X		X	X	X	X		Warehouses used in connection with common carriers.
New Hampshire	X		X	X	X	X	X	
New Jersey	X	X	X	X	X	X	X	

[1] For statutory references see Appendix C.
[2] Delaware has neither statutory definition nor regulation.

Appendix B.—Analysis of State Statutory Definitions of "Public Utility"[1]

3	4	5	6	7	8			9
					Warehouses			
Gas	Water	Communications	Common Carriers	Heat and Refrigeration	(a) No Warehouses Included	(b) Certain Warehouses Included	(c) All Warehouses Included	Others
	X	X	X	X			X	
		X	X	X	X			Aeronautics.
	X	X	X	X	X			
X	X	X	X		X			
X		X	X		X			
X	X	X	X			Warehouses used in connection with common carriers.		Wharfingers.
X	X	X	X		X			
X	X	X	X		X			
X	X	X	X		X			Oil, river improvement, radio.
		X	X		X			"any other public utility."
X	X	X	X	X	X			Ice, stone quarries, public markets and slaughter houses, pavement and sewer works, docks, depots.
X	X	X	X		X			
X	X	X	X	X	X			
	X	X	X	X	X			Sewerage.
		X	X		X			
	X	X	X	X		Warehouses used in connection with common carriers.		Airships, radio, ditches, drainage systems, sewerage.
	X	X	X	X	X			
X	X	X	X	X	X			Sewers.

1	2	3	4	5	6	7	8			
							Warehouses			
State	Electricity, Light, Power	Gas	Water	Communications	Common Carriers	Heat and Refrigeration	(a) No Warehouses Included	(b) Certain Warehouses Included	(c) All Warehouses Included	
New Mexico	X	X	X			X	X			Any mechanical or chemical products.
New York	X	X		X	X	X	X			
North Carolina:										
(a) Private utilities.	X	X	X	X	X	X	X			
(b) Municipal utilities.	X	X	X				X			Schools, public markets, playgrounds, parks, plants, abattoirs, slaughter
North Dakota	X	X	X	X	X	X		Warehouses for food and agricultural products.		
Ohio	X	X	X	X	X	X	X			Messenger
Oklahoma	X	X	X	X	X		X			Cotton gin other sy owned o use."
Oregon	X		X	X	X	X	X			
Pennsylvania	X	X	X	X	X	X	X			Wharves.
Rhode Island	X	X	X	X	X		X			
South Carolina	X	X	X		X	X	X			
South Dakota				X	X				X	
Tennessee	X	X	X	X	X		X			"any other equipment dedicated under licenses by the subdivi
Texas	X	X	X	X			X			Sewerage.

[1] Appendix B.—Analysis of State Statutory Definitions of "Public Utility"

7	8			9
Heat and Refrigeration	Warehouses (a) No Warehouses Included	(b) Certain Warehouses Included	(c) All Warehouses Included	Others
X	X			Any mechanical plant processing or refining agricultural products.
X	X			
X	X			
	X			Schools, libraries, cemeteries, market houses, wharves, playgrounds, parks, garbage plants, armories, auditoriums, abattoirs, sewer systems, slaughter houses.
X		Warehouses for food and agricultural products.		
X	X			Messenger service
	X			Cotton gins, oil, sewerage, "or other systems by whomsoever owned or operated for public use."
X	X			
X	X			Wharves, sewerage
	X			
X	X			
			X	
	X			"any other like system, plant or equipment affected by and dedicated to the public use under privileges, franchises, licenses or agreements granted by the state or any political subdivision thereof."
	X			Sewerage

1	2	3	4	5	6	7	8			9
State	Electricity, Light, Power	Gas	Water	Communications	Common Carriers	Heat and Refrigeration	Warehouses (a) No Warehouses Included	(b) Certain Warehouses Included	(c) All Warehouses Included	Others
Utah	X	X	X	X	X	X		Warehouses storing grain or used in connection with common carriers.		
Vermont	X	X	X	X	X		X			
Virginia	X	X	X	X	X	X	X			Internal improvements, "and all other persons or corporations having the power of eminent domain."
Washington	X	X	X	X	X			Warehouses used in connection with transportation by water.		Wharfinger.
West Virginia	X	X	X	X	X		X			Radio, wharves and any business "which is or shall hereafter be held to be a public service."
Wisconsin	X		X	X		X	X			
Wyoming	X	X	X	X	X	X	X			
District of Columbia	X	X	X	X	X		X			
Total	44	37	42	45	45	25	37	8	3	

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APPENDIX C

Statutory References Underlying Appendix B

State	*Statutory Reference*
Alabama	Code (1940) Title 48, § 302.
Arizona	Code (1939) § 69–201; § 52–901.
Arkansas	Dig. Stat. (Pope 1937) § 2064 (d).
California	State Const. Art. XII, § 23; Gen. Laws (1937 Deering) Act No. 6386 § 2½.
Colorado	Stat. Ann. (1935) Ch. 137, §§ 3, 4.
Connecticut	Gen. Stat. (Rev. 1930) § 3577.
Delaware	
Florida	Stat. 1941, Title 25. Ibidem, § 180.07.
Georgia	Code Ann. § 93–307.
Idaho	Code Ann. (1932) §§ 59–128, 59–129; § 67–202.
Illinois	Ill. Stat. Ann. (Jones) § 112.027.
Indiana	Stat. Ann. (Burns' 1933), § 54–105.
Iowa	Code (1939), § 7874.
Kansas	Gen. Stat. Ann. (1935) §§ 66–104, 66–105.
Kentucky	Rev. Stat. (Baldwin 1942), § 278.010.
Louisiana	Gen. Stat. (Dart's, 1939) §§ 7912, 7980–7997, 7997.1–11.
Maine	Rev. Stat. (1930) Ch. 62, § 15.
Maryland	Code Ann. (Flack, 1939) Art. 23, § 349.
Massachusetts	Ann. Laws (1933) Ch. 159, 159A and B, 160–166.
Michigan	Stat. Ann. § 22.13 (6).
Minnesota	Stat. (1941) §§ 222.01; 237.04; 421.15; 452.01.
Mississippi	Code (1930) § 2455, Supp. (1938) Ch. 154–A.
Missouri	Rev. Stat. Ann. (1942) § 5578.
Montana	Rev. Code (1935) § 3881.
Nebraska	Comp. Stat. (1929) § 75–1302.
Nevada	Comp. Laws (1929) § 6106.
New Hampshire	Rev. Laws (1942), p. 243, § 2; p. 1206, §4.
New Jersey	Gen. Stat. Ann. § 48:2–13.
New Mexico	Stat. Ann. (1941), § 72–302, Const., Art. 11, § 7.
New York	Public Service Law § 2, Subdivision 22; Tax Law § 186a.
North Carolina	Code (1943) § 62–65.
North Dakota	Comp. Laws (1913) (1925 Supp.) § 4609–C–2.
Ohio	Gen. Code (Page) §§ 614–2–2a, 5415.
Oklahoma	Stat. Ann., Title 17, §§ 41, 151; Title 21, § 1265.1; Title 3, § 29.

STATUTORY REFERENCES UNDERLYING APPENDIX B—Continued

State	*Statutory Reference*
Oregon	Comp. Laws Ann. (1940) §§ 112-401, 114-101.
Pennsylvania	Pa. Stat. (Purdon), Title 66, § 1102, Subdivision 17.
Rhode Island	Gen. Laws (1938) Ch. 122, § 2.
South Carolina	Code of Laws (1942) § 8209 (c).
South Dakota	Code (1939) § 52.0201.
Tennessee	Tenn. Code Ann. (Williams 1932), § 5448.
Texas	Tex. Stat. (Vernon 1936) Title 32, Ch. 10.
Utah	Code Ann. (1943) § 76-2-1.
Vermont	Pub. Laws (1933) §§ 6085, 6706 IIIB.
Virginia	Code (1942) § 4087.
Washington	Rev. Stat. Ann. (Remington) § 10344.
West Virginia	Code (1943) §§ 2546, 2553.
Wisconsin	Stat. 1941, § 196.01.
Wyoming	Rev. Stat. (1931) § 94-101.
District of Columbia	D. C. Code (1940) § 43-108; 57 Stat. 974, Ch. 150, § 8.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 112.

DAVIES WAREHOUSE COMPANY, a corporation, *Petitioner*,

v.

PRENTISS M. BROWN, Price Administrator, *Respondent*.

BRIEF ON BEHALF OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, AMICUS CURIAE.

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November 15, 1943.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
OPINION BELOW	1
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
QUESTIONS TO BE ARGUED	5
SUMMARY OF ARGUMENT	5
ARGUMENT	7
Congress Intended to Exempt from the Price Control Act, as "Public Utilities," Public Storage Warehouses Under Actual Maximum Rate Control by a State Regulatory Commission	7
Respondent's Concept of Exempt Public Utilities is Not in Consonance with the Policy and Purposes of the Price Act	16
CONCLUSION	19

TABLE OF AUTHORITIES CITED.

CASES.

Dewey v. *United States*, 178 U. S. 510	12
Hamilton v. *Rathbone*, 175 U. S. 414	12
Munn v. *Illinois*, 94 U. S. 113	9, 10
Prussian v. *United States*, 282 U. S. 675	16
Russell Motor Car Co. v. *United States*, 261 U. S. 514	12
Spokane & Indland R. R. v. *United States*, 241 U. S. 344	12
State v. *Dailey*, 234 N. W. 45 (So. Dak.)	11
Stillwell Hotel Co. v. *Anderson*, 61 P. 2d 71 (Cal.)	9
United States v. *Katz*, 271 U. S. 354	18
Wilbur v. *United States*, 30 F. (2d) 871	12

STATUTES.

Emergency Price Control Act of 1942:

Act of Jan. 30, 1942, C. 26; 56 Stat. 23; 50 U. S. C. A. App., sections 901 et seq.	2
50 U. S. C. A. App. 901	16
50 U. S. C. A. App. 942(c) (2)	7

Inflation Control Act of 1942:

Act of Oct. 2, 1942, C. 578, 56 Stat. 765; 50 U. S. C. A. App., section 961	7, 19

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OPINION BELOW.

The opinion of the United States Emergency Court of Appeals is reported in 137 F. (2d) 201 (E. C. A. 1943 ——), and will be found in the record herein on page 109.

PRELIMINARY STATEMENT.

The National Association of Railroad and Utilities Commissioners is a voluntary association embracing within its membership the members of the regulatory commissions and boards of the several states of the United States except two, one of which has no state regulatory commission.

By the constitution of the Association, the President of the Association may direct the General Solicitor to appear on behalf of the Association (as distinguished from a particular commission represented in its membership) in any proceeding pending before any court or commission in which, in the judgment of such President, appearance on behalf of the Association should be made. This brief is offered for filing on behalf of said Association by direction of the President, in the general public interest.

STATEMENT OF THE CASE.

The petitioner operates a public warehouse in Los Angeles, California. Under the constitution and statutes of that state (R. 2, 3) public warehouses are declared to be "public utilities." They are subject to full and complete public utility regulation, including the regulation of maximum rates and charges, by the California Railroad Commission (R. 22, 23). The Price Administrator, purporting to act under authority of the Emergency Price Control Act of 1942 (50 U. S. C. A. App. sections 901-946), hereinafter called "Price Act," on April 28, 1942 issued a General Maximum Price Regulation (R. 46-75), followed by a Supplementary Regulation No. 11 on June 16, 1942 (R. 83-84), and an Amendment No. 1 to Supplementary Regulation No. 11 on June 23, 1942 (R. 101-105).

Taken together, these three regulations issued by the Price Administrator had the effect of subjecting petitioner's warehouse business to price control under the Price Act, and of freezing its rates and charges at the March, 1942 level. Petitioner was thereby prevented from taking advantage of an increase in certain warehouse rates authorized on May 12, 1942 by the California Railroad Commission (R. 30-36). Petitioner then filed a formal Protest with the Price Administrator, which Protest was denied on July 27, 1942 (R. 41). Two days later the Price Administrator entered orders allowing petitioner to increase its rates and

charges to the level fixed by the California Railroad Commission (R. 8).

In all other respects petitioner's rates and charges are now, if subject to the General Maximum Price Regulation, frozen at the March, 1942 level, and the increases authorized by the Price Administrator are subject to revocation or amendment at any time (R. 8). Under the Price Administrator's interpretation of the Price Act, petitioner is under the dual regulation, as to rates and charges, of the Price Administrator and the California Railroad Commission. It is conceded by all parties that petitioner has been aggrieved by the denial of its Protest.

The petitioner, on August 20, 1942, filed a timely complaint in the Court below. That Court, on May 28, 1943, in a divided opinion, held that petitioner's public warehouse business was not a "public utility" within the meaning of the Price Act (R. 109-144). The petitioner's rates and charges were therefore found to be subject to the control of the Price Administrator and the complaint was dismissed (R. 145).

The Court, in an opinion written by Judge Maris, held that the term "public utility," as used in the Price Act, is limited to those classes of business, such as electric, gas, light, heat, power, water, telephone, and telegraph companies, "which are now almost universally treated as public utilities . . ." (R. 116). The Court held, as a corollary to this that so-called "traditional" public utilities, even though they be actually unregulated, are exempt from price control (R. 114). Judge Vinson wrote a dissenting opinion, (R. 119) in which the view was expressed that petitioner's warehouse business had the characteristics ascribed to public utilities by widespread usage and that it was therefore a "public utility" within the meaning of the Price Act.

Judge Magruder, in concurring with Judge Maris, began by saying:

> "With some hesitation, I concur in the result reached by Judge Maris. This is one of those unfortunate cases

where doubts would remain whichever way the case was decided.

"Judge Vinson in his dissenting opinion has amply demonstrated that complainant has the characteristics of a 'public utility' within the connotation of that phrase in widespread usage." (R. 118)

Judge Magruder did not accept this conception, however, and said:

"* * * I think a candid examination of the legislative history indicates that Congress in Section 302 (c) was probably not using 'public utility' as a term of art; if it had been, Congress would hardly have left without precise definition so elusive a phrase. Congress was, I am inclined to think, using the term loosely and somewhat vaguely as comprehending the familiar and garden variety businesses which would immediately suggest themselves to the lay mind when the phrase 'public utility' is used, and which universally, or almost universally, are under existing federal, state or municipal rate regulation." (R. 118, 119)

Judge Maris concurred in Judge Magruder's opinion, which, as had been noted, was arrived at "with some hesitation." (R. 119)

Judge Vinson apparently decided that the concurring opinion of Judge Magruder called for further comment, for he then added to his dissenting opinion this statement:

"My brothers who stand for affirmance have said that we must take the term 'public utility' in its 'natural and ordinary meaning.' They also appear to agree with the conclusions which I have reached as to that natural and ordinary meaning. They seek, however, to deny the appropriateness of that meaning in the case at bar, saying that in this particular act Congress employed a meaning which is narrower than the usual usage. They urge that the term was used in the Price Act to include only those familiar and traditional public utilities— 'garden variety' stock, as Judge Magruder says. But those who assert a special meaning are charged with its proof. In the absence of a definite showing of the limited meaning, the natural

and ordinary connotation must prevail. Any limitation must be deducible as a clear and ready inference from the Congressional language. I have looked in vain for such language." (R. 141)

QUESTIONS TO BE ARGUED HEREIN.

This brief is filed in support of the following propositions:

1. The court below erred in holding that the term "public utility," as used in the Price Act, comprehends only such enterprises as are now almost universally treated as public utilities for the purpose of regulation under statute statutes.

2. The court below erred in holding that petitioner's public warehouse business is not exempt from price control under the Price Act.

SUMMARY OF ARGUMENT.

1. Congress intended to exempt from the Price Act, as "Public Utilities," public storage warehouses under actual maximum rate control by a state regulatory commission. An enterprise is not exempt under the statutory provisions in question, unless subject to actual maximum rate regulation by a Federal, State or municipal authority. This authority must be a rate regulatory commission, whatever its name may be. Petitioner is subject to rate regulation by the California Railroad Commission. In addition, there are many other circumstances indicating that petitioner is a public utility. Had Congress intended a narrower construction, it would have defined the term. The Act, as amended, read as a whole, does not indicate that Congress was using the term public utility, "loosely" or "vaguely." Congress did not intend to limit the term to the concept which would suggest itself to the lay mind. The context immediately preceding the proviso does not support a narrower construction. Rules of statutory construction do not support a narrower construction. Under respondent's in-

terpretation an arbitrary line must be drawn between enterprises having the same characteristics and subject to the same regulatory controls. No unjustified economic preferences and no undesirable regional competition will result if petitioner's position is sustained. Under repsondent's reasoning, unregulated "traditional" public utilities are denied any procedure to increase or adjust rates. The intervening administrative ruling before enactment of the Inflation Control Act does not, under the circumstances, lend support to respondent's contention.

2. Respondent's concept of exempt public utilities is not in consonance with the policy and purposes of the Price Act. *Amicus curiae* takes the view that only enterprises subject to actual public utility rate regulation are exempt. Respondent contends that all "traditional" public utilities, whether or not subject to actual rate regulation, are exempt. This would create a gap in the stabilization program. The declared purposes and objectives of the Price Act indicate that no such gap was intended by Congress. The legislative history shows that Congress recognized the dangers of leaving public utilities uncontrolled as to rates and charges. The gap, which adoption of respondent's concept would create, is not an inconsequential one. Requiring respondent to control the prices of unregulated public utilities would not impose an unreasonable administrative burden. Respondent's interpretation would result in burdensome and unnecessary *dual* price control. The legislative history of the Norris Amendment shows that Congress specifically rejected the proposal that enterprises subject to rate regulatory commissions should be subjected also to price control by the Price Administrator.

ARGUMENT.

Congress Intended to Exempt from the Price Act, as "Public Utilities," Public Storage Warehouses Under Actual Maximum Rate Control by a State Regulatory Commission.

The principal purpose of the Price Act, as stated in the first section thereof, is to "stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents . . ." The second section provides that the Price Administrator may, by regulation or order, establish the maximum price "of a commodity or commodities." By section 302(c) (2) of the Act (50 U. S. C. A. App., section 942(c) (2), certain commodities are expressly exempted from regulation by the Price Administrator. This section provides, in part:

> "(c) The term 'commodity' . . . includes services rendered . . . in connection with the . . . distribution, storage . . . of a commodity: *Provided*, That nothing in this Act shall be construed to authorize the regulation of . . . (2) rates charged by any common carrier or other public utility . . ."

Common carriers or other public utilities, the rates of which were exempted under the above-quoted proviso, were thereafter, by the amending Inflation Control Act of October 2, 1942 (50 U. S. C. A. App., sections 961-971), required to follow a certain procedure before instituting general rate increases. This procedure is set forth, in a proviso to section 1 of the amendatory act, as follows:

> "The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: *Provided*, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such

agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase.'" (50 U. S. C. A. App., 961)

Reading together the proviso of the Price Act and the proviso of the Inflation Control Act, both quoted above, it is clear that no enterprise is to be regarded as a public utility, and so exempt from price control, unless it is subject to the jurisdiction of some Federal, State, or municipal rate regulatory commission. Only such an enterprise could, before making a general rate increase, consent "to the timely intervention by such agency before the Federal, State or municipal authority having jurisdiction to consider such increase."

But the proviso to the Inflation Control Act indicates not only what enterprises are *not* to be regarded as "public utilities," and therefore not exempt. It also goes a long way toward indicating what enterprises *are* to be regarded as "public utilities."

The Federal, State, or municipal "authority" referred to in the proviso is obviously a railroad or utility regulatory commission or, in the case of municipalities, the city council or other legislative branch of local government. Public utilities do not have their rates fixed by any other kind of Federal, State or local authority.

The Court below suggested that a chancery court might be regarded as such an authority in states where there is no rate regulation. It is true that courts of chancery and equity have jurisdiction to consider the reasonableness of public utility rates upon the filing of a complaint by an aggrieved party, even in the absence of statutory provision for regulation. But never is a public utility required to go into such a court itself to obtain approval of its rates or authority to increase them. Hence, there being no court action pending, such a utility could not consent to the "timely intervention" of respondent. Intervention is the act by which a third party demands to be received as a

party in a suit pending between other persons. *Stillwell Hotel Co.* v. *Anderson,* 61 P. 2d 71 (Cal.).

Moreover, legislative history makes clear that the word "authority" refers to regulatory commissions and not to courts of law. Senator Brown, reporting to the Senate on the substitution, for the Norris Amendment, of the proviso presently contained in the Inflation Control Act, said:

> "There is substituted for it a provision which will require any public utility which asks for an increase in rates to notify the President and to assent to the appearance of such agent as the President may designate to appear in behalf of the consuming public *before the appropriate railroad or public utility commission, be it a State, Federal, or municipal commission.*" (Italics supplied) (Congr. Record, Vol. 88, No. 168, pp. 7970, 7971)

It seems clear, from what is said above, that any enterprise which is subject to maximum rate control by a state regulatory commission engaged in regulating the classes of business which respondent himself concedes are public utilities, is, in the absence of special circumstances, a "public utility" as Congress used that term in these Acts and, hence, exempt from control by the Price Administrator. Such a construction gives full effect to the general purpose of the legislation—the control of prices of all kinds. An enterprise so situated, and no others, is in a position to give the "consent" required by the proviso to the Inflation Control Act.

Needless to say there are no special circumstances existent in this case which point to any different conclusion with respect to petitioner's business. Quite to the contrary, ther are many circumstances, in addition to the foregoing, to indicate that petitioner is a "public utility" as Congress intended to use that term. Petitioner conducts a public warehouse business. This class of business has been, since the leading case of *Munn* v. *Illinois,* 94 U. S. 113, declared to be a business affected with a public interest. Had the

term "public utility" been in vogue in 1876 when *Munn* v. *Illinois* was decided, there is little doubt that the Court would have termed grain warehouses "public utilities." As stated by Judge Vinson:

> "There is evidence, however, in more recent Supreme Court decisions that that Court has considered public warehouses to be in the public utility category. The *Munn* case has frequently been the only citation offered in support of a proposition of law relating to *public utility* regulation. (citing *Producers Trans. Co.* v. *Railroad Comm. of Calif.*, 251 U. S. 228, 231; *Terminal Taxicab Co.* v. *District of Columbia*, 241 U. S. 252, 254; also in *City of Phoenix* v. *Kasun*, 54 Ariz. 470, 97 P. (2d) 211, 212)" (R. 132)

Petitioner's business is, pursuant to the California State constitution and statutes, declared to be, and regulated as, a public utility by the California Railroad Commission (R. 2-5). Under such regulation, petitioner is obliged to afford its facilities to the public generally, upon demand, at fair and non-discriminatory rates (R. 22, 23). Petitioner operates its business pursuant to a certificate of convenience and necessity (R. 134).

As against this imposing array of circumstances supporting petitioner's status as an exempt "public utility," what substantial arguments can be produced? The Court below, after recognizing that petitioner has the characteristics of a public utility, as that term is generally understood, says that Congress had a narrower concept in mind—that it was using the term:

> ". . . loosely and somewhat vaguely as comprehending the familiar and garden variety businesses which would immediately suggest themselves to the lay mind when the phrase 'public utility' is used, and which universally, or almost universally, are under existing federal, state or municipal rate regulation." (R. 119)

But if Congress intended such a construction to be placed upon this term, why did it not see fit to define the term? It would have been a simple matter for Congress to have listed

the "traditional" public utilities if it intended such a limitation. A statute should not be given a strained construction to effect a result which could easily have been obtained by plain enactment. *State* v. *Dailey*, 234 N. W. 45 (So. Dak.).

A reading of the entire Act does not leave one with the impression that Congress intended to speak "loosely" or "vaguely" with respect to any of its parts. Precise and detailed provisions are made covering every phase of the subject matter. Eleven terms are separately defined, including such common terms as "sale," "price," and "person." Congress would surely have indicated by definition or other context that a narrow construction was intended, if such had been the case.

It was suggested by Judge Magruder that Congress intended the term "public utility" to comprehend "the familiar and garden variety businesses which would immediately suggest themselves to the *lay* mind . . . ." (R. 119) (Italics supplied). But this is an Act of general application and nationwide scope. It establishes administrative machinery, provides a complete appeal procedure, sets up guides for other federal agencies and deals with some of the most intricate and important relationships of the business world. It was prepared by lawyers, is administered with the assistance of lawyers, and provides a special court for judicial review. No court has defined the term "public utility" as being limited to "traditional" public utilities. Viewing the Act as a whole, it seems highly improbable that Congress, while couching the rest of the Act in explicit legal terms, intended the one phrase "public utility" to be interpreted as it would be understood by the "lay mind."

The Court below sought to find significance in the fact that the section which contains the proviso exempting public utilities states that the term "commodity" as used in the act "includes services rendered . . . in connection with the processing, *distribution*, *storage* . . . of a commodity."

(Italics supplied) Judge Maris concluded that "Here is definite indication that storage of commodities, the business of a public warehouseman, is intended to be covered by the act." (R. 116) Of course if this were true, all common carriers would also be excluded from the term "public utility," for they are engaged in the "distribution" of commodities. The plain fact is that some distribution and some storage facilities are subject to the controls of the Price Administrator, but when either is conducted as a public utility then, as Judge Vinson expressed it, "It falls within the provided exemption, which is dominant and controlling." (R. 143)

In support of the narrower construction of the phrase "public utility" reliance is placed upon various rules of statutory construction. One of these is the well-established rule that exceptions to a general policy should be strictly construed. *Spokane & Inland R. R.* v. *United States*, 241 U. S. 344. But it is also well established that rules of statutory construction are never used to create, but only to remove, a doubt. *Dewey* v. *United States*, 178 U. S. 510, *Russell Motor Car Co.* v. *United States*, 261 U. S. 514, *Wilbur* v. *United States*, 30 F. (2d) 871. When the ordinary meaning has been ascertained, the Court has no further inquiry to make, *Hamilton* v. *Rathbone*, 175 U. S. 414, and hence has no occasion to apply "strict" or "liberal" construction.

Another rule of statutory construction which has been advanced as supporting the limitation of the term "public utility" to those enterprises universally or almost universally regulated as such, is the rule that "descriptive terms used in a federal statute will, in the absence of language in the statute indicating a contrary intent, be given a general and uniform interpretation throughout the country." (R. 111) As we have pointed out above, there *is* language in the statute—contained in the proviso to section 1 of the Inflation Control Act—indicating that the exemption is to apply to any public utility subject to rate control by a reg-

ulatory commission, Federal, State or local. In view of the express language in the Act, this rule of statutory construction has no function to perform.

Moreover, respondent itself has not, under its interpretation, found a way to arrive at full and complete uniformity in all particulars, even within the restricted classes of business which he acknowledges are public utilities. As Judge Vinson has so ably expressed it:

> "The Price Administrator did not apply his so-called 'uniformity' rule in issuing regulations under the Price Act. Therein public utilities are exempted from regulation. In Supplementary Regulation No. 11, Amendment No. 1, however, in exempting certain enterprises from price regulation, the Price Administrator included gas, electric, water, *et al.*, companies furnishing or supplying *'as public utilities.'* (Italics supplied) Clearly, however, if all companies producing gas, electricity, and water were public utilities, the quoted appendage to the exemption is superfluous. It is a well known fact that there are many companies furnishing these facilities which are not public utilities, and any attempt to treat them as such would be in derogation of due process. Some of them are public utilities, and some of them are not, all depending upon how they are organized and operated. One will be burdened with the essential characteristics of which I have spoken. Another will not be. One will be subject to the controls of the Price Administrator, the other will not be subject. So it is, and must be, with public warehouses." (R. 138)

Accepting, for the moment, respondent's view that the term "public utility" is limited to so-called "traditional" public utilities, where is the line to be drawn and who is going to draw it? Respondent does not classify storage warehousemen as "traditional" public utilities, although they are regulated in twenty-two states (Chart, Appendix B, Petitioner's brief herein). Yet respondent regards heating companies as public utilities and exempts them from price regulation (R. 103), although they are regulated in

only twenty-eight states. Does the existence of state regulation in a bare majority of states classify a business as a "traditional" public utility? It would seem so in view of the practical application of the concept which respondent has made.

The Court below voices this further view:

> "Particularly in the light of the wide variety of businesses which have been designated and regulated as public utilities in some of the states (citing examples) there is compelling force in the Price Administrator's argument that under such an interpretation of the act unjustified economic preferences, regional competition and other evils might well result." (R. 112)

It is difficult to see how "unjustified economic preferences, regional competition and other evils" will result from a ruling that an enterprise already subject to complete rate regulation by a rate regulatory commission need not submit also to rate regulation by the Price Administrator. The enterprises of this character which are subject to price control by the Price Administrator and those subject to rate regulation by state commissions would be substantially similarly situated.

The "unjustified economic preferences" and "regional competition" will result, not from the interpretation *amicus curiae* supports, but from respondent's, whereby one enterprise may be subject to dual price and rate regulation while a competitor in an adjoining state may be subject to neither one nor the other.

Under respondent's reasoning how is an unregulated "traditional" public utility to make any rate increase which may prove necessary? It cannot apply to the Price Administrator for an adjustment of established maxmum prices, for respondent says such a utility is not subject to the Price Administrator's regulations. It cannot follow the procedure provided in the Inflation Control Act, for that procedure is available only to a regulated utility which can "consent to the timely intervention by respondent before

the Federal, State, or municipal authority having jurisdiction to consider such increase." Hence, under respondent's reasoning, such public utilities are without any procedure for obtaining rate increases and adjustments. Can it be that Congress intended to create such a discrimination, hardship and absurdity? The question answers itself.

The lower court called attention to the failure of Congress to further define the term "public utility" in the Inflation Control Act, after the Price Administrator had issued the intervening administrative interpretation contained in Amendment No. 1 to Supplemental Regulation No. 11 (R. 114). This interpretation granted complete exemption to nine classes of common carriers and other public utilities without regard to their status as to existing rate regulation. In answer to this we can do no better than to quote Judge Vinson's effective reply:

> "It is true that the courts have given weight to an intervening administrative interpretation which has been the subject of considerable practice and tacit approbation. I do not feel, however, that it may be fairly said that the regulation, upon which the majority rules, imputes notice to Congress. The statement that warehouses and storage are to be considered subject to the General Maximum Price Regulation serves no indication that the Price Administrator did not consider such regulation subordinate to the provisions of the Price Act exempting 'public utilities' from regulation, and that he did not intend to exempt those warehouses which were so treated. The reliance upon such an interpretation begs the question which we are here called upon to decide, as I see it. At any rate, it can hardly be expected that Congress, as a whole, would be acquainted with the prodigal detail of the Price Administrator's orders and regulations, and particularly with an interpretation which was hidden in the recesses of a proviso to the 68th item of an order amending a supplementary regulation to an original order, which was of three and a half months' duration and had not been interpreted by this Court." (R. 141)

Respondent's Concept of Exempt Public Utilities is Not in Consonance with the Policy and Purposes of the Price Act.

It is the position of *amicus curiae* that for an enterprise to be an exempt public utility, within the meaning of the Price Act, it must be subject to actual maximum rate regulation. Respondent takes the view that all "traditional" public utilities, and no others, are included within the exemption. This position has forced respondent to contend that unregulated "traditional" public utilities are free and clear of price control by the Price Administrator. A gap in the stabilization program is thereby created.

That Congress did not intend to leave a gap in over-all price control by exempting, as public utilities, enterprises which are not subject to rate regulation, is clearly apparent from a study of the general purposes and objectives of the Price Act. It is well settled that a statute will be construed in the light of its general objectives and the legislative policy revealed in the Act. *Prussian* v. *United States*, 282 U. S. 675.

The first section of the Price Act (50 U. S. C. A. App. 901) contains these sweeping declarations of purpose:

> "(a) It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents . . . to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in price. . . ."

Here is no indication that Congress intended to create a gap in the price control of one of the most important parts of the economic structure—public utilities. The nationwide dangers of inflation, so thoroughly dealt with by the Price Act in every other respect, would be left unchecked in an important field of business activity if public utility services throughout the country, of the "traditional" type or not, were omitted from price control through the circumstance that there is no existing rate regulation. That Congress was apprised of this danger is indicated by the fact that Mr. Leon Henderson, in his testimony on the bill before the House Committee on Banking and Currency, said (Part I of Hearings, page 144):

> MR. HENDERSON: I do not regard it necessary to include in a price bill all the elements such as utility costs, interest charges, transportation costs, personal services, *but I am not unmindful that unless they are kept within bounds it would be impossible to prevent inflation.* (Italics supplied)

The gap which respondent's construction of the phrase "public utility" has left in nationwide price control is not an inconsequential one. Since none of the "traditional" public utilities in Delaware are subject to rate regulation, they all escape price regulation under the Price Act. Truck rates are not regulated in Illinois, New Hampshire, or New Jersey; express companies are not regulated in Indiana; electric companies are not regulated in Florida, Iowa, Minnesota, Mississippi, Nebraska, or South Dakota; gas companies are not regulated in Florida, Indiana, Iowa, Minnesota, Mississippi, Nebraska, and South Dakota; telephone companies are not regulated in Iowa, Minnesota, or Texas; water companies are not regulated in Florida, Iowa, Michigan, Minnesota, Mississippi, New Mexico, or South Dakota, (Appendix "B," Petitioner's brief herein.) Under respondent's reasoning, all of these important "traditional" public utilities escape price regulation or rate regulation of any kind or character save in such cases as a chancery court

might take jurisdiction upon the filing of a complaint as to reasonableness of rates.

The respondent asserts, and the Court below adopts, the view that to require the Price Administrator to fix prices of unregulated "traditional" public utilities would place upon him an unreasonable administrative burden. "(It) would in effect," the Court says, "make the Price Administrator a public utility commission for the State of Delaware." (R. 112)

We respectfully submit that the controlling of utility prices in Delaware should not seem so tremendous or frightful a task in the light of respondent's vast price control activities in other fields. Can it be that Congress was willing to let respondent fix retail and wholesale prices of numberless commodities the country over, but that it regarded the control of utility prices in Delaware too great a task? Is it probable that Congress regarded respondent capable of fixing the price of coal throughout the nation and the price to be paid the farmer, the dairyman, the lumberman, and the manufacturer—but not capable of fixing the price of telephone calls in Iowa?

It has already been pointed out that respondent's position leads to the result that in Delaware there is neither rate regulation by the state nor price regulation by the Price Administrator. The same is true in all of the other states where one or more classes of "traditional" public utilities are not subject to state rate regulation. On the other hand, respondent's position also leads to the result that there is *dual* price regulation of public storage warehouses in California and the twenty-two other states where such businesses, or some types thereof, are subject to rate regulation. Double price control serves not to promote, but to confuse and render burdensome and unfair the nationwide system of controls which Congress had in mind. As this Court said in *United States* v. *Katz*, 271 U. S. 354, 357:

> "All laws are to be given a sensible construction, and a literal application of a statute, which would lead to

absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose."

Reference to the legislative history of the Inflation Control Act shows conclusively that Congress was desirous of avoiding dual price regulation. On the floor of the Senate, on September 10, 1942, Senator Norris of Nebraska, offered a bill, the purpose of which was to amend the Price Act to require:

> "That rates charged by any common carrier or other public utility shall not be increased without the consent of the Price Administrator." (Congr. Record, Vol. 88, No. 155, pp. 7343-7346, set out in Appendix "A" of Petitioner's brief herein, page XX)

This amendment would have subjected all public utilities to dual rate regulation, regulation by their respective regulatory commissions having jurisdiction, and by the Price Administrator. The Norris Amendment, with slight changes by the Senate, was incorporated into H. R. 7565 (Appendix "A" of Petitioner's brief herein, page XX). This amendment was rejected by the Senate after the House conferees refused to accept it. For the Norris Amendment there was substituted the present proviso to section 1 (50 U. S. C. A. App. 961) of the Inflation Control Act (Appendix "A" of Petitioner's brief herein, page XXI). By this action Congress specifically rejected the proposal that enterprises, subject to rate control by state regulatory commissions, should be subjected also to price control by the Price Administrator.

CONCLUSION.

The judgment below should be reversed.

Respectfully submitted on behalf of the National Association of Railroad and Utilities Commissioners.

JOHN E. BENTON,
FREDERICK G. HAMLEY,
Attorneys for said Association,

November 15, 1943.

p. 5.

SUPREME COURT OF THE UNITED STATES.

No. 112.—October Term, 1943.

Davies Warehouse Company, Petitioner, *vs.* Chester Bowles, Price Administrator. } On Writ of Certiorari to the United States Emergency Court of Appeals.

[January 31, 1944.]

Mr. Justice Jackson delivered the opinion of the Court.

The petitioner, Davies Warehouse Company, is incorporated under the laws of California and conducts a public warehouse in Los Angeles. Its business is declared to be that of a public utility both by the Constitution of California[1] and its Public Utilities Act.[2] The Act subjects to regulation by the Railroad Commission all warehouses which serve the public generally for compensation. § 2½. New warehouses may be established only after obtaining certificates of public convenience and necessity, which the Commission may refuse or condition and may suspend or revoke at any time for cause. § 50½. Petitioner must grant nondiscriminatory and equal rates to everyone, and it may not alter any existing rate or charge without permission. §§ 19, 15. The Commission upon its own motion or upon complaint may determine "the just reasonable and sufficient rate" and fix the same by order.

[1] "The Legislature shall pass laws for the regulation and limitation of the charges for services performed and commodities furnished by telegraph and gas corporations, and the charges by corporations or individuals for storage and wharfage, in which there is a public use . . . ." California Constitution, Art. IV, § 33.

"Every private corporation, and every individual or association of individuals, owning, operating, managing, or controlling any commercial railroad, interurban railroad, street railroad, canal, pipe-line, plant, or equipment, or any part of such railroad, canal, pipe-line, plant or equipment within this State for the transportation or conveyance of passengers, or express matter, or freight of any kind, including crude oil, or for the transmission of telephone or telegraph messages, or for the production, generation, transmission, delivery or furnishing of heat, light, water or power or for the furnishing of storage or wharfage facilities, either directly or indirectly, to or for the public, and every common carrier, is hereby declared to be a public utility subject to such control and regulation by the Railroad Commission as may be provided by the Legislature . . . ." California Constitution, Art. XII, § 23.

[2] California Gen. Laws (Deering, 1937) Act 6386, § 2(dd).

§ 32. Petitioner is required to make periodic reports and is subject to numerous restrictions and disabilities. §§ 29, 51, 52, 75, 76, et al.

Several public warehouses, including the one before us, made application to the Commission for general rate increases. The Commission gave a public hearing in February 1942. From undisputed testimony it appeared that: notice of hearing had been sent to over 3,000 customers and no one appeared in opposition; rates had not been advanced since 1938; wages, however, had been advanced on four different occasions; materials and supplies and wages of clerical and supervisory employees had also increased; overall costs of operation had risen during the period 20-26 per cent. On May 12, 1942, the Commission authorized a general 15 per cent advance which, it said, "will permit applicants to increase their rates to reimburse them in part for their added labor expense." The permission was so conditioned, however, that the reasonableness of any particular rate could be attacked by any customer, either by way of reparation proceeding, for which the Act makes provision, or otherwise. The effective date of the new rates was set by the Commission as May 22, 1942.

In the meantime the United States Price Administrator, acting under the Emergency Price Control Act,[3] on April 28, 1942 issued a General Maximum Price Regulation. The effect of the federal regulation and later amendments would have been to prohibit petitioner after July 1, 1942 from charging the rate authorized by the California Railroad Commission.

This federal Act provides that "nothing in this Act shall be construed to authorize the regulation of . . . (2) rates charged by any common carrier or other public utility."[4] Petitioner, asserting itself to be within this exemption, made timely protest to the Price Administrator, which was denied. It then filed a complaint

[3] 56 Stat. 23, 50 U. S. C. (Supp. II, 1942) § 901 *et seq.*

[4] § 302(c), 50 U. S. C. (Supp. II, 1942) § 942(c), reads: "The term 'commodity' means commodities, articles, products, and materials (except materials furnished for publication by any press association or feature service, books, magazines, motion pictures, periodicals and newspapers, other than as waste or scrap), and it also includes services rendered otherwise than as an employee in connection with the processing, distribution, storage, installation, repair, or negotiation of purchases or sales of a commodity, or in connection with the operation of any service establishment for the servicing of a commodity: *Provided*, That nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility, or (3) rates charged by any person engaged in the business of selling or under

with the United States Emergency Court of Appeals, on which the Act confers exclusive original jurisdiction to determine the validity of regulations,[5] asking it to set aside the General Maximum Price Regulations in so far as they purport to regulate its charges. The Emergency Court of Appeals dismissed the complaint. Importance of the construction of the Act to its administration led us to grant certiorari. — U. S. —.

Congress, in omitting to define "public utility" as used in the Act, left to the Administrator and the courts a task of unexpected difficulty. Use of that term in a context of generality wears an appearance of precision which proves illusory when exact application becomes necessary. Relevant authorities and considerations are numerous and equivocal, and different plausible definitions result from a mere shift of emphasis. It may be contended that the exemption runs in favor of any business generally and traditionally regarded as a utility, irrespective of actual state regulation. Or it may be urged to include any enterprise actually regulated as are utilities, regardless of traditional classification. Or it may be said to extend only to those businesses where actual utility regulation exists along with general and traditional utility character.

The Emergency Court of Appeals weighed the conflicting factors in thorough opinions and divided as to result.[6] Judges Maris and Magruder gave little weight to the existence of actual regulation and held the phrase to comprehend enterprises of the general utility type, among which they thought this warehouse had no place. They held that the federal price regulation superseded that of the state, but said, "This is one of those unfortunate cases where doubts would remain whichever way the case was decided"—a reservation we share. Chief Judge Vinson declared

writing insurance, or (4) rates charged by any person engaged in the business of operating or publishing a newspaper, periodical, or magazine, or operating a radio-broadcasting station, a motion-picture or other theater enterprise, or outdoor advertising facilities, or (5) rates charged for any professional services."

[5] § 204(d), 50 U. S. C. (Supp. II, 1942) § 924(d), provides: " . . . The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. . . ."

[6] 137 F. 2d 201.

that this public warehouse possesses the basic indicia of a public utility and in addition has its rates fixed by an agency of the state, and under these circumstances must be considered a public utility within the meaning of the Act. He thought the state regulation should prevail over that of the Federal Price Administrator.

In *Munn* v. *Illinois*, 94 U. S. 113 (1877), this Court recognized that the business of public warehousing is "affected with a public interest" and that its regulation by the state is appropriate and constitutionally permissible. Cf. *Budd* v. *New York*, 143 U. S. 517, 544. Twenty-one states regulate warehouses in some respects.[7] Three states include warehouses in their statutory definition of public utilities,[8] and eight include limited types of warehouses.[9] Forty-seven states have adopted the Uniform Warehouse Receipts Act, which gives warehouse receipts legal standing somewhat similar to that of a common carrier's bill of lading.[10]

We cannot, therefore, assume that Congress was unaware that a general statutory reference to "public utilities" might well be taken at least in some states to comprehend public warehouses. But Congress did not see fit to employ that precision of definition which it has used when it desired to make sure that its classification of public utilities for federal purposes would depend upon the nature of their activities uninfluenced by any state policy.[11] Legislative history is ambiguous, and in no instance was attention directed to the particular problem presented here as to the.

[7] Arizona Code (1939) § 52-901; Arkansas Acts 1935, Act 83; California Gen. Laws (Deering, 1937) Act 6386, § 2 *et seq.*; Idaho Code Ann. (1932) § 59-128; Illinois Rev. Stat. (Bar Assn. ed. 1943) c. 111⅔, § 10 *et seq.*, c. 114, § 189 *et seq.*; Indiana Stat. Ann. (Burns, 1933) § 54-105 *et seq.*; Kansas Gen. Stat. (1935) § 34-224 *et seq.*; Maine Rev. Stat. (1930) c. 62, § 15 *et seq.*; Minnesota Stat. (1941) c. 233; Missouri Rev. Stat. Ann. (1941) § 14685.1 *et seq.*; Nebraska Comp. Stat. (Supp. 1941) c. 88, § 219 *et seq.*; Nevada Comp. Laws (1929) § 6106 *et seq.*; North Carolina Code Ann. (1939) § 5124, Laws 1941, c. 291; North Dakota Comp. Laws (Supp. 1925) § 4609, c. 2, *et seq.*, Laws 1931, c. 227; Oklahoma Stat. (Supp. 1943) tit. 81; Oregon Comp. Laws Ann. § 60-301 *et seq.*; South Dakota Code (1939) c. 60.03; Texas Stat. (Vernon, 1936) art. 6445; Utah Code Ann. (1943) § 76-2-1 *et seq.*; Washington Rev. Stat. Ann. (Remington) §§ 10344, 10392, (Supp. 1940) § 11569-1 *et seq.*; Wisconsin Stat. (1941) § 195.21.

[8] California, Indiana, South Dakota, *loc cit. supra* note 7.

[9] Arizona, Idaho, Illinois, Maine, Nevada, North Dakota, Utah, Washington, *loc cit. supra* note 7.

[10] 3 Uniform Laws Ann. (Supp. 1942) 6.

[11] E. g., Public Utility Holding Company Act of 1935, § 2(a), 49 Stat. 804, 15 U. S. C. § 79b(a); Federal Power Act, § 201(e), 49 Stat. 848, 16 U. S. C. § 824(e).

scope of the term "public utility." But the phrase was used to measure inclusions as well as exemptions and it seems to have been employed in a practical rather than legalistic sense. An effort was made in the Senate to insert a provision that public utility rates should not be increased without consent of the President.[12] That proposal was rejected, however, and a provision was substituted which required any public utility which asked for an increase in rates to notify the President and to assent to the appearance of such agent as the President may designate to appear in behalf of the consuming public before the appropriate railroad or public utility commission, be it a state, federal, or municipal commission.[13] It is difficult to believe that a different scope was intended to be given to the same words in different sections of the bill. The use of the same generic term in these different contexts indicates that it had no narrower connotation and should receive no stricter interpretation in the exemption merely because used to define an exemption.

Legislative history is unequivocal in its showing that rates already subject to state regulation as public utility rates were not considered in need of further control. Mr. Leon Henderson, one of the authors of the bill and the first Price Administrator, gave as reasons for exempting utilities that they seemed to be under an adequate system of state regulation;[14] that this was an area not likely to give difficulty or to cause, so far as could then be seen, any inflationary trend; that utilities had problems peculiar to themselves and no further regulation seemed necessary;[15] and

[12] Amendment proposed by Senator Norris to S. J. Res. 161. H. R. 7565, as amended by Senate, § 1, 77th Cong., 2d Sess.

[13] 56 Stat. 765, 50 U. S. C. (Supp. II, 1942), § 961.

[14] ". . . and public utilities were under what for the time being at least seemed to be an adequate system of State regulation, and therefore did not need to be brought into review." Hearings before House Committee on Banking and Currency on H. R. 5479, 77th Cong., 1st Sess., Pt. I, Revised, p. 444.

[15] "Now, as to the utilities. There is, as the members are aware, an adequate set of regulations as to the charges which utility companies can make. These, again, are based upon a long series of judicial determinations, of State regulations and of State laws. It seemed to those drafting the bill that this was an area which was not likely to give difficulty or to cause, so far as they could see at that time, any inflationary trend. The bill is designed to control an emergency inflationary situation and has left them out, just as it has transportation rates. There are questions peculiar to utilities and none of them, so far as I see at the present time, would make necessary further regulation by means of a price control bill." *Id.*, p. 54-55.

that he had found the agencies in control of utility rates "just as earnest as we are about keeping those costs down."[16]

Under these circumstances the reasonable view appears to be that Congress by the term "public utilities" exempted those whose charges already were regulated as public utilities and hence were not probable sources of inflationary dangers. It may be and probably is the case that in its rate regulation the California Commission will take account of different factors and have different objectives than does the Federal Price Administrator. That might have appealed to Congress as a reason for not exempting utilities at all, but it hardly helps define the limits of the exemption, for that objection is as cogent against what admittedly is included as against that which is left in doubt.

We think Congress desired to depart from the traditional partitioning of functions between state and federal government only so far as required to erect emergency barriers against inflation. No question as to the power of Congress to reach and regulate this business, should it find it necessary to do so, has been raised here. But as matter of policy Congress may well have desired to avoid conflict or occasions for conflict between federal agencies and state authority which are detrimental to good administration and to public acceptance of an emergency system of price control that might founder if friction with public authorities be added to the difficulties of bringing private self-interest under control.[17] Where Congress has not clearly indicated a purpose to precipitate conflict, we should be reluctant to do so by decision.[18] In view of assurances to Congress that the evil would proceed only in a minor degree, if at all, from public utilities already under state price control, we think Congress did not intend, and certainly has given no clear indication that it did intend, to supersede the power of a state regulatory commission, exercising comprehensive control over the prices of a business appropriately classified as a utility. Classification by California of the public warehouse

[16] ". . . I have found that every one of the agencies charged with these particular items of cost are just as earnest as we are about keeping those costs down." *Id.*, p. 445; see the dissenting opinion of Chief Judge Vinson in the Emergency Court of Appeals, 137 F. 2d 201, 205.

[17] The National Association of Railroad and Utilities Commissioners has filed a brief *amicus curiae* in opposition to what they consider an invasion by the Price Administrator of their field of public regulation.

[18] Terminal Railroad Association of St. Louis v. Brotherhood of Railroad Trainmen, 318 U. S. 1.

business as a utility is not novel, surprising, or capricious. The regulation imposed is not merely nominal or superficial but appears to be penetrating and complete. Therefore, we would have little hesitation in holding that petitioner's public warehouse under the circumstances is a public utility within the exemption of the Price Control Act, but for certain practical objections to that interpretation, urged on behalf of the Administrator with an earnestness which deserves, in view of the difficulties and importance of his task, careful examination.

1. It is urged that if the status of an industry under state law is to be considered, the Administrator "would have to face the question whether the particular business concerned was sufficiently 'affected with a public interest' constitutionally to justify the type of legal obligation which the state imposes." The argument, in short, is that the Administrator would have to decide whether the state regulation is constitutional before he should recognize it. We cannot give weight to this view of his functions, which we think it unduly magnifies. State statutes, like federal ones, are entitled to the presumption of constitutionality until their invalidity is judicially declared. Certainly no power to adjudicate constitutional issues is conferred on the Administrator. Collusion between a state and a favored industry to impose forms of local regulation as a shield against federal control might be conceivable and if such a sham occurred the Administrator could perhaps challenge its effectiveness to support an exemption. But it more nearly accords with experience to assume that an industry does not submit to price regulation until it has explored all possible constitutional objections and litigated hopeful ones. We think the Administrator will not be remiss in his duties if he assumes the constitutionality of state regulatory statutes, under both state and federal constitutions, in the absence of a contrary judicial determination.

2. It also is objected that if we consider the status of an industry under state law, the Price Administrator "would have to scrutinize and differentiate many kinds of franchises. Thus the Administrator, as an incident to the task of price control, would be called upon to determine in any number of particular instances questions of state law which require the most painstaking examination of statutes and decisions." We are not prepared to deny that in some degree this will be true, for we do not hold that all warehouses, or even that all warehouses regulated in

some aspects, come within the exemption. We think the Administrator will have to form judgments and that they will be judgments of some difficulty. Simplicity of administration is a merit that does not inhere in a federal system of government, as it is claimed to do in a unitary one. A federal system makes a merit, instead, of the very local autonomy in which complexities are inherent. Nor would the interpretation advocated by the Administrator avoid the necessity of ascertaining and considering rights thought to be possessed under local laws and not likely to be yielded readily. One effect of the Administrator's interpretation would be to postpone study of local laws from consideration in connection with wise administration to the time of litigation, as in this case. Local institutions, customs, and policies will not be overridden without fighting for consideration. The existence and force and function of established institutions of local government are always in the consciousness of lawmakers and, while their weight may vary, they may never be completely overlooked in the task of interpretation. At a time when great measures of concentration of direction are concededly necessary, it may be thought more farsighted to avoid paralyzing or extinguishing local institutions which do not seriously conflict with the central government's place. Congress has given no indication that it would draw all such state authority into the vortex of the war power. Nor should we rush the trend to centralization where Congress has not. It could never be more appropriate than now to heed the maxim reiterated recently by the Court that "the extension of federal control into these traditional local domains is a 'delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions.'" *City of Yonkers* v. *United States*, No. 109, October Term, 1943, decided January 3, 1944; *Palmer* v. *Massachusetts*, 308 U. S. 79, 84. At least in the absence of a congressional mandate to that effect, we cannot adopt a rule of construction, otherwise unjustified, to relieve federal administrators of what we may well believe is a substantial burden but one implied by the terms of the legislation when viewed against the background of our form of government.

3. It also is contended that an interpretation must prevail as matter of principle which will give the exemption a general and uniform operation in all states irrespective of local law. It is, of course, true that uniform operation of a federal law is a

sirable end and other things being equal, we often have interpreted statutes to achieve it.[19] But in no case relied upon did we achieve uniformity at the cost of establishing overlapping authority over the same subject matter in the state and in the Federal Government. When we do at times adopt for application of federal laws within a state a rule different from that used by a state in administering its laws, the two rules may subsist without conflict, each reigning in its own realm. It is a much more serious thing to adopt a rule of construction, as we are asked to do here, which precludes the execution of state laws by state authority in a matter normally within state power. The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state. The custom of resorting to them to give meaning and content to federal statutes is too old and its use too diversified to permit us to say that considerations of nationwide uniformity must prevail in a particular case over our judgment that it is out of harmony with other objectives more important to the legislative purpose.[20] What content we should give to the exemption in the case of a conventional utility not subject to a state regulatory statute or subject only to partial regulation is, of course, not before us.

4. Lastly, it is contended that we should accept the Administrator's view in deference to administrative construction. The administrative ruling in this case was no sooner made than challenged. We cannot be certain how far it was determined by the considerations advanced, mistakenly as we think, in its defense in this case. It has hardly seasoned or broadened into a settled

[19] The Administrator cites Chicago Board of Trade v. Johnson, 264 U. S. 1; Lyeth v. Hoey, 305 U. S. 188; Morgan v. Commissioner, 309 U. S. 78; Jerome v. United States, 318 U. S. 101, 104. See also Deitrick v. Greaney, 309 U. S. 190; O'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U. S. 467, 470; Sola Electric Co. v. Jefferson Electric Co., 317 U. S. 173, 176; Clearfield Trust Co. v. United States, 318 U. S. 363.

[20] See Mangus v. Miller, 317 U. S. 178, Corn Exchange Bank v. Klauder, 318 U. S. 434, Myers v. Matley, 318 U. S. 622 (bankruptcy); Uterhart v. United States, 240 U. S. 598, 603, Crooks v. Harrelson, 282 U. S. 55, Blair v. Commissioner, 300 U. S. 5, Helvering v. Fuller, 310 U. S. 69, 74, Helvering v. Stuart, 317 U. S. 154 (taxation); McClaine v. Rankin, 197 U. S. 154, Rawlings v. Ray, 312 U. S. 96 (statute of limitations); Brown v. United States, 263 U. S. 78 (condemnation); New York, C. & St. L. R. R. Co. v. Frank, 314 U. S. 360, 364-66 (railroad consolidation); United States v. Oklahoma Gas & Electric Co., 318 U. S. 206; Board of Commissioners v. United States, 308 U. S. 343.

administrative practice. If Congress had deemed it necessary or even appropriate that the Administrator's order should in effect be final in construing the scope of the national price-fixing policy, it would not have been at a loss for words to say so. We do not think it should overweigh the considerations we have set forth as to the proper construction of the statute.

We hold that the petitioner's business is that of a public utility within the exemption of the Act, and the judgment below is accordingly

Reversed.

SUPREME COURT OF THE UNITED STATES.

No. 112.—October Term, 1943.

Davies Warehouse Company, Petitioner, *vs.* Chester Bowles, Price Administrator. } On Writ of Certiorari to the United States Emergency Court of Appeals.

[January 31, 1944.]

Mr. Justice Douglas, with whom Mr. Justice Black and Mr. Justice Murphy concur, dissenting.

I think the present decision places an unwarranted burden on those who are waging the present war against inflation. The Act exempts from federal price control the "rates charged by any common carrier or other public utility". § 302(c). The Administrator has accordingly granted exemptions to enterprises furnishing the public with gas, electricity, water, light, heat or power, and telephone and telegraph services. That group embraces those enterprises which together with common carriers were traditionally included in the category of a "public utility". It should not be expanded by interpretation to include the filigree variety with which we are now concerned.

The purpose of the Act is to provide an instrument for national control of the inflationary forces set loose by the war. The need for uniformity in the enforcement of the Act is acute—to avoid inequality in burden and sacrifice; to weigh the odds for success as heavily as possible on the side of the public interest. The other exemptions in the Act apply uniformly throughout the country—wages, insurance rates, theatre admissions, fees for professional services, and the like. If the "public utility" exemption is confined to the traditional classes of utilities, substantial uniformity will be obtained as they are almost universally subject to rate regulation in the States. But under the view taken by the Court warehouses will be exempt in some States but not in others. The same will be true of wharves and docks, slaughter houses, public markets, cotton gins and what not. And even in the same State there will be exemptions for some warehouses but not for others. This dependence of exemptions on the vagaries of state

law would be quite understandable if the federal act were designed to mesh with state control—federal control being interposed to take up where state regulation was impossible or ineffective, as in various types of public utility regulation. Then there would be a great need in view of our federal system to preserve as much local autonomy as possible. The same would also be true where only a partial overriding of state controls was necessary to reach the limited federal objective. But the war against inflation is a grim affair calling for quite different requirements. It cannot be waged along those traditional lines. The luxuries of peace-time arrangements do not always fit the exigencies of this war emergency. Nor do the state rate-regulations in question supplement the federal system. They override it. And standards which they prescribe are not the standards for price-fixing under the present Act. The conventional power to fix rates is governed by criteria quite different from those which control the Administrator's action. He is to fix those maximum prices which "will be generally fair and equitable and will effectuate the purposes of this Act." § 2(a).

Every exception read into the Act creates another point of leakage, multiplies the task of enforcement, and creates a favored class of businesses. I would not read the Act with such a hostile eye. Where two interpretations are possible I would take the one which avoids those results. The choice between the "letter" and the "spirit" is an ancient one even in the law. See Radin, A Short Way With Statutes, 56 Harv. L. Rev. 388. In this case I think the wrong choice has been made.